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# SCOTCH REFORM,

CONSIDERED WITH REFERENCE TO THE PLAN  
PROPOSED IN THE LATE PARLIAMENT,

THE REGULATION OF THE COURTS,

AND THE  
ADMINISTRATION OF JUSTICE

IN SCOTLAND

AND ILLUSTRATIONS OF  
ENGLISH NON-REFORM

IN THE COURTS OF SCOTLAND  
DURING THE PRESENT REIGN,  
AND  
CORRUPTION,

IN THE ADMINISTRATION OF JUSTICE  
IN THE COURTS OF SCOTLAND

AND HOW THEY ARE TO BE REMEDIED IN LIGHT

OF A SERIES OF LAW REFORM

ADDRESSED TO

THE RIGHT HON. LORD GRENVILLE, &c. &c. &c.

WITH  
TABLES,

BY WHICH THE PRESENT CAUSES OF EXCESSIVE COMPLICATION, DELAY,  
EXPENSE, AND INEFFECT, ARE DISTINGUISHED FROM SUCH  
AS ARE NATURAL AND UNAVOIDABLE

BY JEREMY BENTHAM OF LINCOLN'S INN, ESQ.

ESQ.

LONDON:

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1818







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ENGLISH NON-REFORM:

IN THE COURSE OF WHICH  
*DIVERS IMPERFECTIONS, ABUSES,*  
AND  
*CORRUPTIONS,*

*In the Administration of Justice,*  
WITH THEIR CAUSES,

ARE NOW, FOR THE FIRST TIME, BROUGHT TO LIGHT.

IN A SERIES OF LETTERS,  
ADDRESSED TO  
THE RIGHT HON. LORD GRENVILLE, &c. &c. &c.  
WITH  
TABLES,

IN WHICH THE PRINCIPAL CAUSES OF FACTITIOUS COMPLICATION, DELAY,  
VEXATION, AND EXPENSE, ARE DISTINGUISHED FROM SUCH  
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BY  
JEREMY BENTHAM OF LINCOLN'S INN, Esq.  
BARRISTER AT LAW.

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London:

PRINTED BY RICHARD TAYLOR AND CO., SHOE-LANE,  
FOR J. RIDGWAY, 170, OPPOSITE BOND-STREET, PICCADILLY.

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1808.

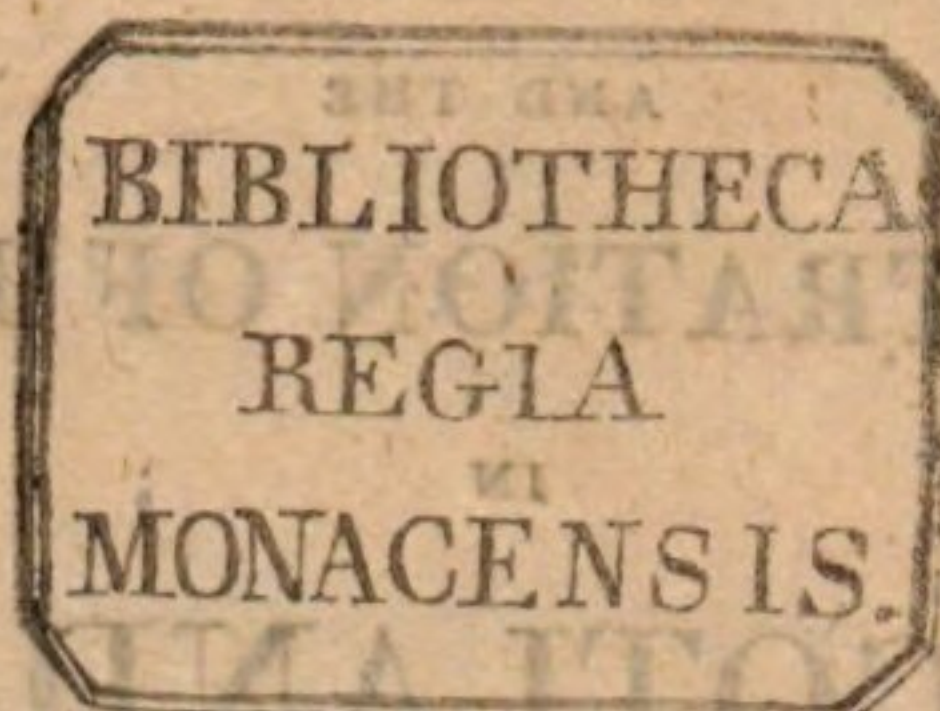


# SCOTCH REFORM

CONSIDERED WITH REFERENCE TO THE PLAN  
PROPOSED IN THE LAST PARLIAMENT

FOR

## THE REGULATION OF THE COURTS



WITH ILLUSTRATIONS FROM

## ENGLISH NON-REFORM

IN THE COURSE OF WHICH

DIVERS IMPROVEMENTS, ADVANCES

AND

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IN THE ADMINISTRATION OF JUSTICE

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THE RIGHT HON. LORD GREENWILL, &c. &c. &c.

WITH

### TABLES

IN WHICH THE PRINCIPAL CAUSES OF THE PRESENT CORRUPTION, DEFECTION,  
AND DELAY, ARE DISTINGUISHED FROM SUCH  
AS ARE NATURAL AND UNAVOIDABLE

BY

JEREMY BENTHAM OF LINCOLN'S INN, ESQ.

ESQ. OF THE BAR

LONDON:

PRINTED BY RICHARD TAYLOR AND CO. ST. MARTIN'S LANE

FOR J. RIDGWAY, 170, OXFORD STREET, RICHMOND

1808



## ADVERTISEMENT.

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THE matter contained in the four following Letters, including the two sheets of Tables subjoined to them, was written, it will be observed, at different times in the course of the years 1806 and 1807.

In the mean time, a variety of incidents has taken place, and the face of the whole business, as laid before Parliament, has undergone a variety of changes. But, as to the matter of the ensuing Letters, if there be any thing in it that presents a prospect of being of use, that use will not be found to have received any diminution from any of those changes.

A continuation is in the press, comprising the originally proposed *Chamber of Review*; the two arrangements proposed, one or other of them, to serve instead of it, by the *Lord President* and ten others out of the fifteen Lords of Session; and the Bill said to have been laid upon the table of the House by the *Lord Chancellor* (Lord Eldon), and printed by Order, dated 10th August, 1807.

In a separate work, is intended to be humbly submitted to Parliament, and in particular to the House of Lords, a plan for enabling the House to render, to suitors of all three kingdoms, that justice, its inability of rendering which, has now for so many years been so severely felt by the public, and so explicitly acknowledged in the House.

A *Summary View* of the Plan is already begun to be put into circulation.



# ADDENDUM

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## ERRATA.

- Page 7 line 17 from bottom, for 100 read 89.  
20 line 5 from bottom, left hand column, for *Plaintiff* read *Defendant*.  
23 line 2, for *motion* read *motions*.  
25 line 5 from bottom, for *real* read *jurisprudential*.  
35 line 31, after *Now* insert *should*.  
37 line 9 from bottom, for *his* read *this*.  
40 line 4 from bottom, for *experiments* read *experiment*.  
45 line 20, for *no* read *any*.  
56 line 2, for *in the little* read *on the little*.  
57 line 11 from bottom, for *in* read *on*.  
73 last line but one, after *put* insert *out*.  
75 line 10, for *it* read *at*.  
83 line 22 from bottom, for *come* read *comes*.  
95 line 37, for *chance thus gets* read *chance he thus gets*.  
95 line 10 from bottom, after *chance* insert *he*.



LETTER  
TO  
LORD GRENVILLE,  
&c. &c. &c.  
ON THE  
PROPOSED REFORM  
IN THE  
ADMINISTRATION OF CIVIL JUSTICE  
IN  
SCOTLAND.

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LETTER I.

MY LORD,

IN the account given in the public prints, of a speech of your lordship's, on the occasion of the proposed reform, "relative to the administration of civil justice in Scotland," I observed a passage inviting suggestions from without-doors. Should these my humble endeavours be found productive of any useful lights, it is to that invitation that the subject will be indebted for them.

If Scotland feels, as no doubt she will, and does already, her obligations to your lordship, for the proposition itself, so ought the three kingdoms with their dependence for the invitation coupled with it. In this they may behold a constitutional comment on the primitive text, *de minoribus principes consulunt, de majoribus omnes*: in this, the constitutional and only rational application of the principle of universal suffrage: information accepted from every source; suggestion, the work of the understanding, open to all; decision, the work of the will, confined to the comparatively few, among whom, without Polish confusion, it can possibly be shared.

According to the terms of the speech, as stated in the paper that lies before me, in the designation made of the persons from whom communications were called for, the members of the Scottish bar were the only persons particularly mentioned. If, from the letter of the invitation, any such limitation could with propriety be deduced, it was doubtless because, at the moment, the situation so designated,



nated, presented itself to your lordship's notice, as the only source from which, on such a subject, any useful information could naturally be expected. Deviations from the ordinary state of things, could not, in so general a survey, have naturally been taken into the account. But as Africa of old was noted for physical, so have the British islands been in modern times for psychological singularities. Hence it is, that so far as the habit of contemplating the field of law, in the point of view in question, that of a field of reformation and improvement, (the very point of view, in which, on the present occasion, it fell in your Lordship's way to bestow a glance upon it)—I mean, so far as the *length* of that habit can be regarded as capable of aiding the effect, or supplying the deficiency, of other qualifications—neither the Scottish bar, nor any other description of persons, could probably afford a pen, the suggestions of which would be less exposed to the imputation of temerity, than these, how small soever may be their value, which are now courting the honour of your lordship's notice.

Two noble and learned lords, in whose wisdom and experience your lordship finds, day by day, an ever increasing treasure, wait on this occasion, as on all others, your lordship's signal for pouring out the stores of it. Some time before those illustrious persons had, either of them, begun to make his profit of the imperfections, or, as some would say, the abuses, with which the *regular* system of procedure is spotted, or of which, as some would say, it is composed, the obscure interloper, whose bow is now making to your lordship, had made it the business of his life to inquire into the means of remedying them.

As to the measure itself, viz. that of endeavouring to infuse the spirit of reform into Scottish judicature, preceding administrations reckoned this, it seems, in the number of their velleities: what they had been thinking of doing, your Lordship has done.

In the sort of relation, your lordship bears to the measure, I find a relief from an unpleasant difficulty. In your lordship it beholds its patron and introducer; the author, it is matter of ease to me not to know. To the Athenians their legislator presented (such was his plea) the best of all plans that would have been borne with: to Scotland, under a most crying urgency, Lord Grenville presents the best, or perhaps the only plan that was to be had.

As to the general complexion of the plan, to prevent temporary misconceptions, permit me, my Lord, to submit to your Lordship, at this early period, the general result  
of



of my researches, in two very simple propositions: that in point of utility, there is enough in it to afford an ample justification to the provisional acceptance your Lordship has been pleased to give to it: that at the same time, when minutely sifted by a not unexercised hand, and with that continuity of attention which it was impossible, in your Lordship's place, to spare for it, it will be found to fall extremely short of the professions, and perhaps expectations, of the learned author, not to speak of your Lordship's indubitably sincere and generous wishes and intentions.

In the track of improvement, by a rare coincidence, for a certain part of the way, the interest of the suitor, that is of the community at large, and the interest of the lawyer, happened to go hand in hand:—just so far I observe the interests of the community really pursued. But, a little further, the interests divide: and there it is that I see that separation taking place, which, in my view of the matter, could not but take place, the interest of the community pursued in demonstration only, the opposite interest of the lawyer being carefully protected, and even advanced, in reality and effect.

Before I proceed any further, I find myself under the necessity of stating a little personal incident, the mention of which would not have been thus obtruded on your Lordship's patience, but for its indissoluble connexion with the present enterprise. Your Lordship's invitation found me employed in putting, as I had flattered myself, the last hand to a work of a somewhat new complexion on the subject of EVIDENCE; a work which, though of greater bulk than I could have wished, was itself but an off-set of a still larger one, not wanting much of its completion, and designed to give a comprehensive view of what, in that extensive subject, taken in all its branches, appeared fit to be done in the way of law. Of that off-set, the object was—to bring to view the reasons, by which I had been satisfied that whether the Roman, the English, or any other system were resorted to, the established rules of evidence, occupied principally in putting exclusions upon the light of evidence, were almost without exception adverse to the ends of justice; a conclusion facilitated in no small degree by the observation, that there is not one of them, in English practice at least, that is not departed from, and, without inconvenience or suspicion of inconvenience, set at naught, and that for reasons that can have no weight or truth in them, on any other supposition, than that of the impropriety of the rule, in every instance in which it is observed.

In



In looking for the causes of this inconsistency (for where in the department of legislation a full light has been thrown upon a subject, *causes* are a topic that can never have been passed by ;) I saw reason to suspect, and that reason gaining strength at every step, that what at first view had presented itself as the result of primæval blindness and imbecillity, was referable, perhaps, in a certain degree, to those causes, but probably in a much higher degree to sharp-sighted artifice ; that to enable themselves to extract from it that profit which constituted their recompense and inducement for taking their part in it, and that with as much *ease* to themselves as the task of gathering in the *profit* admitted of, it was necessary for the founders, and successive supporters, of the system, to give to it a direction, opposite at every turn to the ends of justice ; that among the leading features or main pillars of this system, were the exclusions put upon the most instructive and indispensable *sources* of evidence, and in regard to such information as was not in itself excluded, the preference given to a variety of artificial and less trustworthy *shapes*, in which they found means to clothe it, to the exclusion of the more natural and more trustworthy ; but that these were but a part of a numerous and complicated system of *devices*, all tending to the same altogether natural, but not the less sinister end : and that, in a word, on these points, as on all others, the reason why the system was and is so bad as men feel it rather than see it to be, is, that the *power* found itself in company with the *interest*, and consequently the *will*, to produce as bad a system as the people, with the legislature at their head, could in their primæval, and as yet but little ameliorated, state of relative ignorance and helplessness, be brought, by the utmost stretch of artifice, to endure.

Thus it was, that the delineation of the instruments employed in the planting and culture of the predominant system (I say predominant—for there exists another of very different complexion, of which presently, and which, howsoever over-powered, has no where been altogether killed by it,) constituted a sort of episode, though for the full comprehension of the subject, not an unnecessary episode, to the work having for its main subject the *exclusions* put upon evidence. Finding then, in the system of reform put into your Lordship's hands, what I could not but expect to find in it, as a matter of course—that the profit and ease of the man of law were as carefully provided for as ever, the interests of the people, in their character of suitors, as  
completely



completely sacrificed as ever to those original, and with reference to the man of law, so much nearer objects—and that all the advantage given to the suitor was that comparatively small, though in itself not inconsiderable portion, in which the licensed plunderer would be a sharer with him: finding, in a word, that of all the *devices* above spoken of, there was not one, the full mischief of which was not reserved to the suitor, the full benefit, to say no more, reserved to the man of law, it was my original intention, for the more complete elucidation of the proposed plan of reform, and the resolutions by which the outline of it is delineated, to have subjoined the episode above mentioned—a sort of Picture of the law of procedure—by way of Appendix to this Address. But this picture not being yet in a state of complete readiness for the press, and at the same time the bulk of it, (according to the measure taken of it by my fears,) too large for the proportion of your Lordship's time, which, even upon the most sanguine calculation, could be expected for it; the only feasible course seemed to be to submit to your Lordship, instead of the picture itself, a sort of Table of the Contents of it; a table bearing about the same relation to the work at large, as in the case of those rude sketches, which, according to panoramic custom, are distributed for the accommodation of the curious, whose visits are received or expected, for the picture of the chief seat of Scottish judicature as exhibited in Leicester-square, for the purpose of assisting their recollections or anticipations.

In Scotland, as in England, and elsewhere, the system of judicial procedure has been, in the main, the work, not of legislators, but of judges: manufactured, chiefly in the form—not of real statutory law—but of jurisprudential law:—imaginary law, consisting of general inferences deduced from particular decisions. By primæval indigence, and inexperience, on the part of the sovereign, judges left without salaries, but left with power to pay themselves by fees. Hence, as will be seen, a constant opposition between the ends of *justice*, and the ends (the original, and thence the actual ends) of *judicature*.

Proper direct end or object of the system of procedure, (or *adjective* branch of the law) giving execution and effect to the predictions delivered, to the engagements taken, by the other branch, the main or *substantive* branch of the law: viz. by decisions pronounced in conformity to it.—*Direct* ends of justice, prevention of *misdecision* (decision un-  
conformable



conformable to the regulations and arrangements belonging to the substantive branch of the law), and *failure of justice*. Failure of justice the same thing in effect as misdecision to the prejudice of the plaintiff's side, but taking place without decision, and, for want of it, frequently without legal demand made, and for want of it.—*Collateral* ends of justice, prevention of delay, vexation and expense, in so far as superfluous, or preponderant, (viz. over the mischief from misdecision or from failure of justice).—Misdecision, when to the prejudice of the defendant's side, may be considered either as comprised under the head of *vexation*, or as constituting a separate head of collateral inconvenience, and the prevention of it as constituting a separate end of justice.

Interest of the people, in the character of suitors, perpetual and complete fulfilment of the ordinances of the substantive branch of the law (the utility of which must on this occasion be assumed) and thence of the direct ends of justice. Interest of the judges, (the authors of the system of procedure) maximum of *profit* and *ease*; profit, as much as could be extracted, with as much ease as was consistent with the extraction of it.

Profit and ease increased by the same cause—the increase of the aggregate quantity of fees. Justice thus denied to the poor, to the labouring classes, to the great majority of the people, as being unable to pay the fees; thence the trouble of administering justice to them saved.

Limits set by various causes to the quantum of the fees exigible on each occasion: aggregate of fees thence not otherwise increasable, than by increasing the number of the *occasions* on which fees were exacted: factitious delay, vexation, and expense, the results or accompaniments of the increase so given to the number of those occasions.—Aggregate mass of judges' profit, increasing with the aggregate mass of delay, vexation, and expense; hence the actual ends of judicature, the interests, and consequently the exertions of judges, maintained in a state of constant opposition to the interests of the people, and the ends, viz. thus far only the *collateral* ends, of justice. But, from delay, vexation and expense, result, in various ways, failure of justice, and misdecision, to the prejudice either of the plaintiff's side or the defendant's, whichever be in the right: hence a complete and constant opposition between the ends of judicature, and the *aggregate* of the several ends of justice.

Multiplication of the occasions of extracting fees, the  
cause



cause of factitious complication, intricacy, obscurity, unintelligibility, uncognoscibility, in the system of procedure. By this complication a sort of sham science produced, and with it, on the part of the suitors, the necessity of having recourse to the members of a distinct class or fraternity thus raised up, sole professors of that science, and of the arts belonging to it. Profit of these professional, as well as of the official, lawyers, arising out of the mass of factitious delay, vexation and expense, and increasing along with it, the profit of the one class going hand in hand with that of the other. Hence the closest community and general identity of interests;—a virtual partnership, which may be called the *law partnership*—with the Judges, as managing partners, at the head of it.

On the part of *malá fide* suitors on both sides (suitors conscious of being in the wrong) an interest in increasing the quantity of factitious delay, vexation, and expense: this mass of abuse their only instrument to work with; employed by *malá fide defendants* for staving off, and oftentimes finally eluding, compliance with the just demands on the other side: by *malá fide plaintiffs*, for forcing compliance with unjust demands, or, on the occasion of some trifling demand, gratifying enmity, by the distress or ruin of the object. Community of interests thus effected, between *malá fide* suitors, i. e. dishonest men in general, and the members, official and professional, of the law partnership.

*Malá fide* cause, a cause in which a party on either side is in *malá fide*. Proportion of *malá fide* to *boná fide* causes, in some instances as great as that of 100 to 1. In England, the Exchequer Chamber an authoritatively reported and notorious example.

Truth, the handmaid of Justice; Mendacity, of Injustice. Interest which the judges had and have, in encouraging to the utmost the vices of mendacity on the part of suitors; that is of the body of the people. Propensity to injustice being the source of *malá fide* suits, and *malá fide* suits still more profitable than *boná fide* suits, hence the interest which the partnership has, in placing and keeping in a state of corruption, this the most important part of the morals of the people. Injustice being the great source of lawyers' profit, hence love of injustice, hatred of justice, passions unnatural to all other men, natural to lawyers of all classes. The lawyer, but more particularly the judge, being under the constant necessity of concealing his passions and vices, as well as the interests by which they are generated,



rated—of cloaking the vices under the semblance of the opposite virtues—hence, under the influence of the still existing mode of remuneration, insincerity, hypocrisy, and lawyercraft, become natural, and in a manner necessary, to the appointed guardians of the public morals.

A man being the better qualified for concealing his own vices from others, the more perfectly he has succeeded in concealing them from himself, hence a sort of imbecillity—a relative and partial imbecillity—a disease of the understanding:—another vice endemial among lawyers. Hence a general propensity and aptitude, to mistake for justice the injustice by which they profit.

*Fees* thus rendered the matter of corruption. Various channels, some open, some more or less disguised, through which this matter has been taught to flow, into the pocket and bosom of the Judge. Examples:—Receipt *propria manu*;—Sale of a fee-yielding office for full value;—Fine or *bonus* on admission;—Fee-yielding office given in lieu, and to the saving of the expense, of other provision for a son, or other near relation, or dependant, he doing the duty—or else not doing the duty, but paying a deputy;—Fee-yielding office given, or the profit of it made payable, to persons standing as trustees for a principal, declared or undeclared; if undeclared, supposed of course to be the Judge himself.

Under this state of things, the members of the law partnership, natural and irresistible enemies of the rest of the community. Judges, and the other official members, reconcileable enemies: reconcileable, viz. by the substitution of salaries to fees; but not unless the conversion extends, without exception, through all the offices: on these terms, and on these alone, would the partnership be dissolved. The professional members, enemies absolutely irreconcilable; because professional profit admits not of any such compensation. The moral diseases endemial to this branch of the partnership, not, like those of the other, capable of a complete cure:—but yet of a very considerable remission; viz. by cancelling the *mendacity-license*, granted at present to them and their clients, in the manner explained below.

Were the mass of suffering, inflicted on the people by delay, vexation, expense, and consequent misdecision, as above, no more than equal to the mass of enjoyment accruing to the law partnership by profit gained, there would be no use in the substitution of salaries to fees; no use in rescuing non-lawyers from oppression and pillage under lawyers.

But



but, besides that the sum being given, and circumstances on both sides equal, enjoyment from gain is never equal to suffering from loss ; and that the portion which, being added, converts affluence into opulence in the hands of the lawyer, being taken away, converts, as to the greatest part of it, indigence into absolute ruin, in the person of the distressed debtor, and his frequently no less distressed creditor ; that part of the factitious expense which goes to the account of lawyers' profit, is but a part, and that commonly but a small part, of the whole loss, exclusive of the other evils that accompany it. Hence, although (which is impossible) professional lawyers' profit were to be done away altogether, the welfare of the whole community, lawyers and non-lawyers included, would in a prodigious degree be promoted by the change.

Separately taken, so minute in many instances are the parcels in which the matter of corruption, in the shape of fees, flows into the pocket of the Judge, as to be, to appearance, incapable of creating any efficient sinister interest, in a bosom so strongly strengthened against its influence by remuneration in the shape of salary : but, the degree of seductive force, being as the *quantity* of the *aggregate* mass, and not affected by the *minuteness* of the *component* parts, this minuteness serves but to disguise the force of the seduction, without diminishing it.

System of procedure generated by the influence of this sinister interest, the *Technical* or *Fee-gathering* system : technical, from its nature, fee-gathering, from its object and its cause. Courts in which this system is acted upon, *courts of technical procedure*. Technical procedure, styled at present *regular* : courts in which it is acted upon, *courts of regular procedure*.

System of procedure, which has for its objects the ends of justice, and for its model the course naturally pursued for the discovery of truth and administration of justice, as towards children, servants, or other dependants, in the bosom of a private family, the *Domestic* or *Natural* system of procedure ; requiring nothing but appropriate powers, for the extension of it, with its benefits, over the whole field of political judicature : to which head belong, in some, but not in all instances, the modes of procedure, which at present, in contra-distinction to *regular*, are designated by the name of *summary*. Courts in which this system is pursued, *Courts of Natural Procedure*.

System of *technical* procedure, the work of judges, executed



cuted by them in the form—partly of *statutory* law (as in the case of English *rules and orders*, Scotch *acts of sederunt*, &c.) partly of *jurisprudential* law—with or without occasional patches in the form of statutory law, stuck on by the hand of the legislator, but mostly under the guidance of the members of the law partnership, official and professional, co-operating in concert; consequently under the influence of the sinister interest, opposite, as above explained, to the interests of the community and the ends of justice.

System of *natural* procedure, the work of the legislator, the legitimate and acknowledged legislator, acting in pursuit of the interests of the community, and the ends of justice.

Courts in which the system of natural procedure is exclusively or principally pursued—*In criminali*, the *courts martial*, and preparatory *courts of inquiry*, in both branches, land and maritime, of the military service: in *criminali minori*, courts composed respectively of *commissioners* in matters of Excise, Customs, Stamps, Assessed Taxes, Hawkers and Pedlars, London Hackney Coaches: in *criminali minori et civili*, the courts composed of *justices of peace*, acting singly or in numbers, disengaged from the technical trammels which await them in their periodical great sessions: in *civili*, the courts of requests called *courts of conscience*, the courts composed of *commissioners* in matters of *bankruptcy*; the courts, primary and of appeal, recently instituted for the collection of taxes on property and income; the arbitration courts, composed of judges nominated by the parties; but acting under powers given to them by regular courts, by authority from statute-law.—In Scotland, the courts composed of *justices of the peace* sitting in periodical sessions; but acting summarily under the name of *Small-Debt Courts*: in *ci-devant* France, the *Consular* courts, courts composed of mercantile men, sitting on causes of a mercantile nature: in the Danish dominions, the recently established, more extensively operating, and justly celebrated *Reconciliation courts*.

With us again, in a higher sphere, the Committees of either House of Parliament, sitting in the character of Courts of Inquiry: the several Courts instituted of late years by the legislature for such a variety of purposes;—Settlement of Public Accounts—Liquidation of Claims—Investigation of Abuses, or other objects of Reform:—and, though last mentioned, yet not least, that noble and necessary



sary bulwark of the Constitution, which owes to your Lordship's illustrious father its existence and its name.

Were it on this occasion worth while, other cases might be found, in which Justice has broke loose from the shackles forged for her in the cavern of Chicane; but these may, I should hope, suffice to prove, and to the conviction of all but those who, by interest or interest-begotten prejudice, stand bound never to be convinced, that in no sphere of judicial inquiry, from the lowest to the highest, can the charge, either of impracticability or dangerousness, attach upon the honest pursuit of the ends of justice, by the light of common sense.

But the further this only honest system is from being either dangerous or impracticable, the more complete (as I flatter myself your Lordship will perceive) the moral impossibility, that any further extension of it should meet the wishes, or so much as the endurance, of the man of law:—a system under which there is no *factitious delay*, *vexation*, or *expense*; nor consequently *factitious profit*, parcel of that expense; in which *misdecision* is but an accident, instead of being, as under the hitherto predominant system, a frequent and probable, not to say predominantly probable result, prepared by the operation of a variety of assignable, and peculiarly appropriate causes: a system under which *failure of justice* can scarcely find a place, instead of being, as under the predominant system, in virtue of the arrangements taken for the reconciliation of *ease* with profit, the inevitable lot of the great body of the people.

*Devices*, a denomination that may serve to characterize the several arrangements, principles, and practices, peculiar to the technical system in contra-distinction to the natural; all of them being so many modes of action, conducive at any rate to the *ends of judicature*; and therefore, upon the face of them, contrivances suggested by the desire of giving, to the greatest practicable extent, fulfilment to those sinister ends.

Follows a list of those devices. For greater perspicuity, two columns are placed side by side, one containing a brief designation of the *device*, the instrument of technical procedure; the other the correspondent state of things under the natural system of procedure.

Logically speaking, the quality of the natural system will be seen to be chiefly of the negative cast; constituted by the absence of those *devices*, which constitute so many characteristic features of the technical system.



The arrangements here referred to the natural system, are —partly so many arrangements actually in use and practice in the courts of natural procedure, in some, in most, or in all of them,—partly so many ulterior arrangements, such as, being conducive to the ends of the natural system, that is, to the ends of justice, would be necessary, to the purpose of giving, to the power and beneficial influence of the natural system, an extent commensurate with that of the whole field of judicature.

In the work at large, under the head of each device, explanations are given, where they appeared necessary, under four subordinate heads :—nature and description of the device ; examples of the employment given to it in the established system ; its repugnancy to the ends of justice ; its subservience to the ends of judicature. These elucidations, all of them applicable to the English, most of them (but happily, for Scotland, not all of them) applicable to the Scottish, modification of the technical system, pruned and sheltered by your Lordship's learned adviser, would occupy too much room here, but remain, upon occasion, at your Lordship's command at any time.

### I. *Arrangements of Natural Procedure.*

1. At the outset of the cause, and afterwards, where necessary, the parties, willing or unwilling, heard in the character of witnesses as well as parties, face to face ; except in so far as, by reason of distance or otherwise, such confrontation and mutual explanation is, *physically* or *prudentially*, impracticable ; prudentially, *i. e.* without *preponderant* mischief in the shape of delay, vexation and expense : preponderant, viz. over the mischief in the shape of increased danger of misdecision, for want of the security

### II. *Corresponding Devices of Technical Procedure.*

1. Parties excluded, from first to last, as effectually as possible from the presence of the Judge : in English practice, not admitted till the trial or other ultimate hearing : nor then, but because the Court being open to individuals in general, parties may, if they please, come in with the rest :—an exclusion thus put upon that species of evidence, which in respect of its *source*, is in general most instructive, and would most frequently supersede the necessity of having recourse to other evidence, putting an



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security against deception, afforded by such personal appearance, and consequent explanations and examinations; such conjunct appearance, preceded or not by *ex parte* appearance of the plaintiff, according to the nature of the case.

2. By or in the name of a party, no writing except in the character of *evidence*; nor in that character, except in the shape of minutes taken of the *vivá voce* testimony, delivered by the parties respectively on such their personal appearance as above, when either party thinks fit provisionally to take upon himself the necessary expense: or where testimony in the ready-written form becomes necessary, either in the character of a *supplement* or that of a *succedaneum* to *vivá voce* testimony, as per article 3. For the use of printing as a *succedaneum* to *writing* in the case of the instrument of *demand*, see art. 11.

3. Testimony, received in none but the best *shape*: viz. *vivá voce* testification, subject to counter-interrogation, *ex adverso* and *per judicem*: except in so far as the necessity of time for recollection, arrangement, investigation, perusal of written documents, &c., requires a *supplement* in the form

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an end to the suit, within the same day that gave commencement to it. Uses of this *initial* meeting, as well for prevention of delay, vexation, and expense, as for security against mis-decision, stated in detail.

2. Abuse of writing, pushed to the greatest endurable length:—in English practice, in respect of discourses, delivered in the name of the parties, (see articles 8. and 11.) in Scotch practice, in respect of additional discourses, delivered (as in case of *decreets*) in the name of the court, containing useless repetitions, in tenor or purport, of discourses already delivered in the name of the parties: the abuse always carried to the same excess, without regard either to the importance of the cause, or the capacity of the parties to bear the expense.

3. Testimony received, in some cases, when it could not be helped, in the best shape, as on jury trial, in English practice: but in others, in various inferior, but (to the partnership) profitable shapes, to the exclusion of the best shape; *ex.gr.* 1. *Answers* (in English Equity) ready-written tes-



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form of ready-written testimony; or the impracticability (physical or prudential) of personal appearance produces a demand for testimony in that written form, in the character of a *succedaneum*; subject always to counter-interrogation, in the written form and mode, (the *epistolary* mode) in the first instance, and eventually in the *vivá voce* form besides.

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testimony, extracted from a defendant, by interrogation administered by the plaintiff's lawyer, in the *epistolary* mode alone, when in the *vivá voce* mode it might have been extracted with incomparably less delay, vexation and expense, as well as better security against deception and consequent misdecision. 2. *Depositions, i. e.* testimony collected in the Roman mode (pursued in English Equity, Ecclesiastical and Admiralty practice, in Scotch practice, as well as that of the Continent of Europe, as the ordinary mode); collected *vivá voce, per judicem ad hoc, in secreto judicis*, without counter-interrogation *ex adverso*; and thereupon the tenor, or purport, real or pretended, entire or castrated, pure or interpolated, consigned to minutes, with lawyers' profit, increasing with their length. 3. *Affidavit* evidence, *i. e.* testimony ready-written, not subjectible to counter-interrogation, from any *quarter* or in any *shape*: in English practice, received, to the exclusion of every better shape, in every instance in which it was in the power of judges to receive it in this bad shape; viz. in Bankruptcy Petition causes before the Chancellor, and in *Motion Causes*, principal and incidental (see article 15.) in all the courts: with lawyers' profit, as above.

4. Tri-

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4. Tribunals *within reach*; consequently distributed over the country as equally as possible, regard being had to geographical circumstances, and to the state of the population at the time:—object to be aimed at, facility of repairing to the seat of justice (for the purpose of appearance *coram judice* as above, art. 1.) and returning the same day, on the part of those whose abode is most distant from it.

5. After the first meeting, if the suit be not then terminated, as under natural procedure it actually is in the majority of individual instances, time or times for subsequent appearances and operations, settled *pro re natá*, regard being had to the disposable time of the court, and the convenience of all parties.

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4. Tribunals put *out of reach*; viz. by the immoderate extent given (and in great measure by powers usurped by the metropolitan judges themselves) to the geographical field of jurisdiction of the metropolitan courts; partly for the purpose of rendering the burthen of attendance intolerable, and thereby forcing suitors into the hands of the professional members of the partnership, partly for giving in this way a forced increase to the multitude of profit-yielding suits. Instruments of usurpation, in English practice, *pone* and *certiorari*; in Scottish, *bills of advocacy*. In both countries, primary jurisdiction thus usurped in direct contempt of still existing acts of the legislature.

5. *Blind fixation of times* by general rules, excluding all regard to individual exigencies, in respect of nature and quantity of business to be performed, diversities of distance, &c.;—of times, not for personal appearance of parties, (that being excluded) but for exhibition of written instruments, and performance of other operations, by hireling representatives, connected by a common interest with the judges. Sinister use and objects of the fixation; necessitating applications for dis-

6. Sit-



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6. *Sittings uninterrupted*; as at the London Police Offices: or, at short and equal intervals; as in the courts of Conscience.

7. The cause heard from beginning to end by the same judge: he, by whom the evidence has been collected, deciding upon it the instant the collection is completed. Division of jurisdiction (a few cases excepted for special reasons) performed purely on the *geographical*, not on the *metaphysical* (or say *logical*) principle. No such distinction, as between Pleas of the Crown and Common Pleas; between Law and Equity.

8. No

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dispensation (as per art. 15.) making business in that shape; creating occasions and pretences for *nullification*, as per art. 9.

6. *Sittings at long intervals*; *ex. gr.*: *Terms*, with intervals of from a few weeks, to almost 5 months: *Circuits*, with intervals of 6 or 12 months; with no more than a few days, or a single day, allowed to a place, whatever may be the quantity of business.—Sinister uses—creating delay, to sell to the *malâ fide* suitor: giving him an interest in availing himself of the principle of nullification, &c., affording ease and holyday-time for lawyers, necessitating trials at subsequent times, in different modes, with fresh fees.

7. *Bandyng* the cause from court to court, on a variety of pretences, before the decision is given; one judge to collect the evidence—to hear and receive the testimony—without power to decide on it; another judge to decide on it without having heard it. Sinister uses—making business, *i. e.* occasions for fees; making complication, thence confusion, uncertainty, uncognoscibility, materials for sham science, &c. &c. Examples:—In English Common law, causes sent from King's



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one, perhaps for the sake of the example of the mechanical justice: the judge, with his right upon the law, and upon the in-formation of the parties, and nothing it by his signature; refusing to see either party, for fear of being obliged to see, either that there is no ground for this office, or no necessity for it: while, under natural procedure, a justice of peace, having no profit on any fall, never subjects a man to any such affliction, but for a limited time, and without seeing both parties, and

8. No decision, but upon appropriate grounds; viz. on the joint consideration of the law, (the article of substantive law in question) and of the evidence:—of the tenor of the law, where it has a tenor, as in the case of real *i. e.* statutory law: of the purport, *i. e.* supposed purport, as in the case of imaginary, sham, fictitious, *i. e.* jurisprudential law.

9. No

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King's Bench, Common Pleas, or Exchequer, to Nisi Prius, or Assizes, and back again: in Equity, from Chancery, or Exchequer, to Town Examiners' Office, or Country Commissioners, and back again: and from the superior to a subordinate judge:—In Scottish practice, vibrations between the Provincial Courts and the Metropolitan, and in the Metropolitan, between Outer and Inner House: in both, as well as in the Provincial Courts, between the *deciding* and some *evidence collecting* Judge.

8. Decision *without thought*, and upon *mechanical* principles: a consequence, and sinister use, of *blind fixation* of times; the Judge knowing nothing of the cause, nor of the grounds of the decision to which he lends his authority: the party ruined, because his lawyer failed to comply with an intimation impossible to be complied with, or never made: pretence, the presumption that the party on whose side the failure is, is in the wrong: whereas, under the load of factitious expense, compared with the pecuniary faculties of the bulk of the people, inability through indigence is a cause much more probable. Imprisonment *for debt*, on *mesne process*, that is, before judgment, for an unlimited time,



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King's Bench, Common Pleas, or Exchequer, to Trial, or Assize, and back again; in Exchequer, to Town-Clerk, or Exchequer, to Common Pleas, or Assize, and back again; and from the superior to a subordinate judge. In Scotch practice, visitations between the Provincial Courts and the Metropolitan, and in the Metropolitan, between the Metropolitan and the House of Lords, as well as in the Provincial Courts, between the House of Lords and some inferior collecting judges.

8. Decision without thought, and upon mere legal principles, a course of practice, and similar use of legal forms of words; the judge knowing nothing of the case, not of the grounds of the decision, to which he looks his authority; the party tried, because his law is not failed to comply with an intimation impossible to be complied with, or never

9. No decision, but upon the merits, as above.

10. Not

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time, perhaps for life, one of the exemplifications of mechanical judicature: the Judge, with his profit upon the jail, and upon the instrument of arrestation, sanctioning it by his signature; refusing to see either party, for fear of being obliged to see, either that there is no ground for this affliction, or no necessity for it: while, under natural procedure, a justice of peace, having no profit on any jail, never subjects a man to any such affliction, but for a limited time, nor without seeing both parties, and thence satisfying himself on both these points. *Outlawry*, another instance: any man, who is abroad, consignable to ruin, for non-compliance with a demand, of which it has been rendered impossible for him to be apprised: his property a prey to professional and official men, to the number of a score and upwards.

9. Principle of nullification; decision on grounds avowedly foreign to the merits:—a mere cloak for iniquity, and that a thread-bare one, in every application made of it: the suitor punished, for the failure, real or imaginary, of his lawyer. Sinister uses, making two causes out of one:—encouragement to *malá fide* suitors, never to regard the worst



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worst cause as desperate :—  
arming judges with an in-  
strument of arbitrary power :  
sufficient of itself to render  
the supposed checks illusory :  
—keeping up complication,  
confusion, uncertainty, un-  
cognoscibility, matter of  
sham science, &c. &c.

N. B. The use and benefit  
of this device carried, under  
the English branch of the  
technical system, to an ex-  
tent altogether without ex-  
ample in any other, and in  
particular in the Scottish.

10. Not a syllable ever  
received from any person,  
witness or party, *vivá voce* or  
in writing, without a *secu-  
rity for veracity*, equivalent  
to that which has been at-  
tached to the ceremony of  
an *oath*, or to whatever is  
provided in the case of an  
extraneous witness.

10. *Mendacity-licence* ;—  
to parties on both sides, a ge-  
neral permission of falshood,  
granted by the Judge, to ex-  
tend so far forth as may be  
necessary to the giving birth  
and continuance to *malá fide*  
demands and defences :—for  
this purpose, by a distinc-  
tion purely factitious, allega-  
tions distinguished into  
*pleading*, and *evidence* ; the  
licence granted to pleadings,  
denied to evidence :—in En-  
glish Equity practice, the  
licence withdrawn, but from  
the defendant's side alone, for  
the purpose of giving birth  
to such suits as could not  
have been instituted, but on  
the prospect of his evidence :  
the permission of menda-  
city, backed to a great ex-  
tent by compulsion, in both  
branches (Law and Equity)  
of English practice :—in that,  
and to a greater extent than in  
any other, the licence grant-

11. The

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11. The general nature of the plaintiff's demand, and of the grounds on which it rests, in respect of title, in point of fact as well as law, consigned, as far as consignable, to *printed forms*; and so in regard to the defence: the allegations individualized, by names, places, times, &c., inserted in the blanks: as in the forms provided by divers statutes, and those given in *Burn's Justice*: the *demand*, viz. the payment or other service demanded at the charge of the defendant through the intervention of the Judge, and the *ground* or grounds of the demand, in respect of *title* (events or situations, *collative* of the right) on the one hand, and (the defence not consisting in mere denial) the grounds of the defence in respect of *counter-title* (events or situations, *collative* of the plaintiff's right) bearing reference to corresponding articles of the *substantive* branch of the body of the law, by which such

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ed moreover by Judges to themselves; and acted under, (as in judicial writs and records) and to a vast extent, by assertions which, when they cease to work deceit and injury, do so by accident only, and in so far as their falsity has become too notorious to be any longer productive of this effect.

11. Pleadings, in writing, at Common Law, called *Special Pleadings*, whenever the reply, called for by the Plaintiff's *declaration*, is not understood to be comprisable under one or other of the 4 or 5 excessively abridged expressions, called *General Issues*; altogether void of meaning, but by reference to demands, grounds of demand, defences and grounds of defence, never indicated: expressions imperfectly and discordantly understood by lawyers themselves, rendered completely and manifestly unintelligible to every body else. Under favour of the mendacity-licence, the instruments so contrived, as to give little or no information, or worse than none: principal ingredients, falsehood, nonsense, and surplusage.

In default of the information, which the plaintiff's declaration and the defendant's plea thus profess and fail to give, a supplemental set of *Pleadings*, invented within



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such effects are given to such events and situations as above: the substantive branch of the body of the law being so organized, as to qualify it for being made the subject of such reference. N. B. Reference thus made to the tenor of the law, supposes the rule of action to exist in the shape of *real*, not of *sham* law.

12. Means of securing *forthcomingness*, on the part of *persons* and *things*, for legal purposes, provided on an uniform and comprehensive plan, adapted to the advances made by the age and country in the arts of life: of *persons*, whether in the character of parties or witnesses: of *things*, whether in the character of subjects of property, and as such portions of the *matter of satisfaction*, as for injury, &c. or *sources of evidence*: with diversities, adapted to the condition of the person, the nature of the thing, the purposes for which, in each instance, the *forthcomingness* is requisite.

13. The parties once met in the face of the Judge, a *plan of intercourse* settled between them, to continue so long as the suit continues:—the intercourse to be carried on, in the promptest, least

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within the last half-century, and employed, though not to an extent equal to that of the deficiency, under the name of *Particulars*:—adding of course to delay, and profit-yielding expense.

12. Means of securing *forthcomingness*, subject to endless diversifications, drawn from the style and title of the court, and other irrelevant sources:—in detail, frequently oppressive; in the aggregate, scanty and inadequate:—*forthcomingness* of written-evidence, for example, vainly aimed at, through a course of months or years, (as by a suit in Equity) when it might be effectually secured in as many hours, as by a warrant from a Justice of the Peace.

13. Chicaneries about *notice*.—In regard to notice, two objects:—viz. that he who should have received it, may not receive it, and thereupon suffer as if he had received it: and that, when conveyed



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least expensive, and most certain mode, that the state of society at the time affords: the arrangements of the *letter-post* accordingly adapted to judicial, as already they are so conveniently adapted to commercial purposes.

In regard to *notice*, sole question, *received or not received?*—if not received, the failure is it the result of pure misfortune, or of blame?—if of blame, on the part of whom?—of him *from* whom, or of him *through* whom, it should have been received?

14. Neither *time* nor *place* exempt from the remedial power of justice:—exemption none, on any other ground than this; viz. that, in the individual case in question, the *vexation*, necessary to secure forthcomingness, would be an evil, preponderant over the evil attached to the *failure of justice*.

15. No *incidental application* to the Judge, but by the party himself on whose behalf it is made:—the testimony on which it is grounded, being delivered, as in other

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ed and received, he who conveyed it may suffer as if he had not conveyed it. Ineffectual modes of conveying notice prescribed in the first instance, that business may be made by application for effectual ones. Modes of conveying, or pretending to convey notice, diversified *ad infinitum*, mostly on irrelevant grounds, such as the style and title of the court, and so forth. Question, not whether *received or not*, but whether *good or bad*:—not the less good for *not* having been received; not the less *bad* for *having* been received.

14. *Asylums*, *local* and *chronological*; with diversifications, grounded on the diversity of *courts* and other irrelevant circumstances:—the power of securing obedience to justice, confined in this case to the *day-time*; extended in that case to the *night-time*: confined in this case to *week-days*; extended in that case to *sundays*: one part of the empire rendered a place of security and triumph, to the delinquents of another.

15. *Motion business*;—all *made-business*:—business made by and for *Judge and Co.*, by the exclusion of parties from the presence of the Judge.

Money



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other cases, *vivâ voce*, to the Judge, or in the form of *affidavit* evidence: but in this form, only where the ground of the application comes within some case in frequent occurrence, and as such provided for by printed forms:—the affidavit-maker (deponent) remaining subject to examination in the *vivâ voce* mode, with or without the previous intervention of the *epistolary* mode (as per art. 3.). The demand for incidental applications, being mostly factitious, fabricated under the technical system, by *blind fixation of days*, and so forth, will mostly be anticipated, by the explanations, produced of course, by the initial meeting *coram judice*.

16. *Language* of the instruments as familiar as possible: composed, as far as possible, of words in ordinary use: terms not in ordinary use, employed as sparingly as possible, and then never without explanations composed of terms in ordinary use.

17. Truth

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Money received for motion of course, so much money received on false pretences.

Occasions for motions *not of course*, made by defaults, real or pretended, the result of the *blind fixation of times*, seconded by the principle of *nullification*.

Motions not of course, always grounded on testimony, delivered in no other than the *affidavit* shape, and when opposed, and with counter-evidence, opposed by evidence in that same and no other shape. Motion business, including incidental motions and motion causes, almost peculiar to English practice.

16. Use of *jargon*; principle and practice of *jargonization*. Jargon, its *shapes*:—foreign language, obsolete language, technical language undefined, nonsense, fiction, ordinary language perverted:—its *uses*, to produce—1. *on the part of the law*, uncertainty, uncognoscibility, matter of sham science; 2. *on the part of the non-lawyer*, conscious ignorance, thence consultation and advice, (*opinion-trade*,) or misconception, thence misconduct, litigation, lawyers' assistance or vicarious service, with advice at every step; 3. *on the part of the legislator*,



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17. *Truth*, unremittingly and exclusively sought for :—truth, the whole truth, and nothing but the truth. Falsehood, from no person, on no occasion, wilfully endured, much less uttered, by the Judge.

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tor, conscious ignorance or experienced mis-conception, thence disgust, or groundless awe, propensity to regard reform as hopeless, or undesirable : 4. in favour of the professional lawyer, monopoly of the faculty of succeeding to judicial offices :—as if a monopoly of the faculty of serving as boarding-schools to girls, were secured to brothels ; or, of carrying on wholesale trade, to swindlers.—Analogy between jurisprudential and other jargons—astrology, palmistry, alchemy, thieves' cant, &c.

17. Use of *fictions* ; in the character of grounds and reasons. Fiction (in law) a wilful falsehood, uttered by a Judge, for the purpose of giving to injustice the colour of justice. *General* uses of fiction to the partnership, (whether the decision grounded on it be otherwise lawful or unlawful) its uses in the character of *jargon* (as per art. 16.) and (by holding up the vice of mendacity in an honourable light, in the character of a necessary instrument of justice) its efficacy, in the way of *example*, in corrupting the morals and understanding of the people. *Special* uses, the particular advantage, compassed on each particular occasion, by the injustice of which it is made



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made the instrument.—*Ex. gr.* stealing conveyancing business, as, under English law, in the case of *common recoveries*; stealing jurisdiction, as in the case of the battle royal among the Westminster Hall Courts. English judicature polluted with this vice, to a degree altogether without example in the judicature of Scotland, or any other country upon earth.

18. Magnification of *jurisprudential law*, the work of Judges, pursuing the partnership interest:—this imaginary law, represented as entitled to more respect than real law, the work of the legitimate legislator, pursuing, after appropriate and comprehensive inquiry, the interest of the people.—Blackstone's attempt to pass off upon the people this sham law, as their work, sanctioned by their consent:

19. Contempt manifested, on all favourable occasions, towards real law:—sometimes by downright disobedience; sometimes by discourses, undervaluing it, and speaking of it as if less entitled to popular attachment and respect, (as per art. 18.) than real law.

20. *Double - Fountain* principle;—a contrivance for exercising arbitrary power,



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power, by employing or rejecting *ad libitum*, this or that one of the instruments of injustice above mentioned. *Ex. gr.* excluding the parties (as per art. 1.) or admitting them :—receiving testimony in a bad shape (as per art. 3.) or in a good one :—under the notion of *stare decisis*, applying the principle of nullification, (as per art. 9.) or under the notion of liberality, refusing to apply it :—pursuing the *fiction*, (as per art. 17.) or refusing to pursue it :—in the case of an article of statute law habitually disobeyed, as per procedure of the Scottish Court of Session *passim*, continuing or ceasing to disobey it.

Should the following sheets be found to present any claim to attention, it may perhaps be matter of convenience to your Lordship to see, at this early stage, and at one glance, the general result of the inquiry :—My Lord, it is this—

1. That, so far as concerns the *breaking down of the Court into Sections*, (as per Resolutions 1. 2. 3. 4.) the result, in respect of the ends of justice, and the interest of the people in the character of suitors, is all pure benefit :—but so is it to the law-partnership.

2. That what concerns the *mode of pleading* (as per Resolution 5), being nothing more than a repetition *in terminis* of what has been law these twenty years, as far as an act of the Court of Session could make it so, promises no better fruit ; and that the profession, if they have not much to hope, have quite as little to apprehend from it.

3. That, in Scotland, of the proposed introduction of *Jury trial in civil cases*, (as per Resolutions 6. 7. 8. 9.) the pro-



probable mischief, in the shape of increase of delay, vexation, and expense, seems greater than its probable good effect in the shape of a security against misdecision: that the proper stage for that species of judicature is that of *appeal*, after a *viva voce* explanation, upon oath, between the parties, and decision thereupon; and not after a series of written pleadings, not upon oath, in the first instance: always under the supposition, (learned lords and gentlemen—but, good my Lord, do not join them—will smile at the simplicity of it) that, on the demesne, hitherto, on account of the richness of the soil, reserved for the chace of lawyers' profit, the interest of the whole community may be thought fit to be cultivated, in preference to the interest of that small but domineering part of it, and the ends of justice pursued, in preference to the ends of judicature.

4. That the other arrangements proposed, apparently in the character of remedies against delay, vexation, and expense (as per Resolutions 10. 11. 12. 13. 14. 15.—) viz. (*optional* substitution of appeals to advocations and suspensions, interposition of a Chamber of Review between the Court of Session and the Lords, prohibition of appeals against interlocutors, allowance of penal costs in the House of Lords, and retrenchment of superfluous judicial writings),—bid fairer, when taken together, for increasing than diminishing the aggregate mass of that fund of suitors' misery and lawyers' profit: and that the specific remedies, which could scarce have failed to present themselves to an experienced eye, have with congenial delicacy been put aside, in consideration of their too extensive and too drastic efficacy.

5. That of the system of disorder, to which the plan upon the carpet applies its powder of post, there is not any part that does not admit of a perfect cure: which cure consists in nothing more than an extended application of remedies that, as already submitted in the preceding pages, have over and over again received the sanction of the legislature: and that in that part of the field of procedure, to which those efficient remedies have not yet been applied, there is nothing that can render them less applicable to it, than to those to which, with so complete though untrumpeted a success, they have been applied already.

Before I close this introductory letter, I will beg leave just



to hint at a circumstance, which, to a statesman of your Lordship's discernment and experience, can not, I think, but have suggested a suspicion at least, not unfavourable to the conceptions above submitted. Among so large an assemblage of acute and vigilant minds, whose interests are so materially concerned, your Lordship has received marks of satisfaction from many, of dissatisfaction, I believe, from none. Now, that Titius or Sempronius should originate, or even, without the merit of origination, support a measure, by which, to a limited amount, his own interest, in the gross sense of the word *interest*, would be prejudiced, is by no means without example: and that persons of this generous frame of mind, are even now to be found at no great distance from your Lordship, the present Parliament has already testified. But that any *body* of men, especially so large, and domineering a body, should, without the pressure of necessity, manifest either active approbation, or so much as any thing like patient acquiescence, under any measure, which by such acceptance would be converted into a *self-denying ordinance*, is, I am inclined to think, absolutely without example, certainly out of the ordinary course of human nature. Yet the plan has been in their hands these six months, and such is the countenance, generally, if not universally, turned to it by learned Gentlemen: they admire, though as yet in the air, the beauties of this New Jerusalem: they congratulate one another, and even in print, on the fresh prospects opened to them: and under these circumstances, no wonder that the spirit of the Union, that younger brother to the *original contract*, remains still inviolate. But, should any plan present itself, pursuing, upon the only terms, on which, to any considerable extent, it could be pursued, the interest of the whole community, I mean, at the expense of this prædatory part of it, no sooner would any such plan excite an apprehension of its acceptance, than the Union would be no less in danger, than the Church at one time used to be. Such is the discovery, a man might venture to predict, without the gift of prophecy: and that without any other reserve than this, viz. that as there are some predictions which by invitation will sometimes produce, so there are others which by shame will sometimes prevent, their own accomplishment.

To place their system under the protection, and the country, beyond redemption, under the tyranny, of dead men, legislating on a state of things, of which no concep-

tion



tion had ever presented itself to their minds, is among the standing resources of all those intestine tormentors of the body politic, whose prosperity depends upon the preservation of abuse, in all or any of its forms, against the attacks of the probe, or the incision-knife, in the reforming hand.

Would your Lordship wish to see, and in a still clearer and stronger point of view, the signification and value of this *quietism*? Compare it, my Lord, contrast it with the sort of countenance shown to the act (4 G. 2. c. 26.) for consigning to the language of the people the tenor and history of those proceedings by which their lives and fortunes are disposed of. My lord, the opposition it underwent from learned lords and gentlemen, underwent in both houses, was *unanimous*. So, at least Chandler in his account of the Debates assures us: Chandler *in terminis*; and with Timberland for his support.

By the English Patricians of those days, the same sense of injury was felt, as was felt at Rome by the learned lords and gentlemen of that time, when the book of Procedure, so religiously kept under lock and key, was stolen and published by the arch-thief Flavius\*, in such sort as forced them to compose another, placing it under better guard: in the one case, the rule of action was locked up bodily in a box, in the other, it was locked up spiritually in a dead language:—the same sense of injury, that is felt by the same learned persons, and as constantly, howsoever covertly, testified, by some of them, as often as, by a wicked and jury-less Court of Conscience act, the possibility of obtaining justice in certain cases, has been extended to this or that other minute portion of the people:—the same sense of injury, in a word, as was felt by the shark, who carried off one of sir Brook Watson's legs, at the thoughts of being obliged to leave the other in its place. A shark is still a shark, in Britain as at Rome, after the Christian æra as before. The Ocean breeds them with triple rows of teeth; the technical system with teeth not less sharp, and bushy manes like sea-lions. My lord, when a shark is seen wagging his tail in the wake of a ship, it is a sign (so the sailors say) that there is prey in preparation for him in the belly of it.

\* Liv. Dec. 1. lib. 9.—Plin. Nat. Hist. lib. 3.



By means of the above *key*, compressed and imperfect as it is, should the execution have fulfilled in any degree the wishes and humble endeavours of the workman, your Lordship may perhaps find it rather easier than at first, to come at the real tendency and probable effects, of the plan already put into your hands by the learned reformer: such at least is the object of the attempt I am thus making upon your Lordship's time.

In the sequel of these pages I propose to myself, in the distribution of the parts, to pursue the following order:

Part I. The proposed plan, as delineated in the Resolutions, examined,—*i. e.* confronted with the ends of justice. Title used for shortness, *Proposita*.

Part II. Indication of a few of the most prominent *abuses*, and other *imperfections*, observed on the face of the *existing* system; being such as appeared capable of being remedied without any material change in its technical character, but are not noticed in the *Resolutions*—*Omissa*.

Part III. Outline of a different plan of reform, grounded on the *natural* system: followed by observations, designed to operate in support of it, and an indication of certain *auxiliary measures*, designed principally to promote the efficiency of the natural system, as above applied, but not altogether inapplicable to the existing system, in its present technical state. Title, used for shortness, and for the mere purpose of reference, casting itself upon your Lordship's indulgence, for its unintentionally dictatorial garb, *Facienda*.



## LETTER II.

*Proposed Division of the Court of Session.*

THE explanations in my former letter being premised, I proceed to submit to your Lordship in detail my remarks on the plan, as delineated in the 17 Resolutions passed in the House of Lords.

In the present letter, I propose to consider in one groupe, the four first, the *subject* of which is the division of the one existing court of session into several courts—and the *object*, the providing at any rate a remedy against *delay*; and perhaps an additional remedy against *misdecision*, in so far as these mischiefs may respectively have the multiplicity of Judges for their cause. I repeat the Resolutions here, to save the trouble of reference.

## “ RESOLVED,

1. “ That it appears to this Committee, that the Increase of  
“ Manufactures, Extension of Trade, Improvements of Agri-  
“ culture, and consequent Multiplication of Transactions, have  
“ varied the Nature, and greatly increased the Number of  
“ Suits brought before the Courts of Law in Scotland, and  
“ thence by Appeal into this House;

“ And that it has therefore become necessary that some Al-  
“ terations should be made in the Establishment of the Courts  
“ of Law in that Part of the United Kingdom, adhering as  
“ much as possible to the Forms and Principles of the Laws of  
“ Scotland, and maintaining invariably the true Meaning and  
“ Spirit of the Articles of Union.

2. “ That it will greatly conduce to the better Administra-  
“ tion of Justice in the Court of Session, and will be for the  
“ evident Utility of Scotland, that the said Court, instead of  
“ sitting in one collective Body of Fifteen Judges, shall sit in  
“ such Number of separate Chambers as may be found most  
“ convenient; and that the Lords sitting in such Chambers  
“ respectively, shall exercise the same Functions, and shall enjoy  
“ the same Authority and Privileges, as are now exercised and  
“ enjoyed by the whole Lords sitting together.

3. “ That in each of the said Chambers, one of the Judges  
“ belonging to such Chambers shall preside, such presiding  
“ Judge to be appointed by his Majesty to the said Office,  
“ during good Behaviour.

4. “ That



4. “ That Causes coming in the first Instance into Court  
 “ as Inner House Causes, may be brought before any one of  
 “ the Chambers, at the Choice of the Party instituting the Suit;  
 “ and that Causes coming into the Outer House, before any one  
 “ of the ordinary Lords of Session, and there decided, may  
 “ be removed by reclaiming Petition, or otherwise, into that  
 “ Chamber only of which such Lord Ordinary shall be a  
 “ Member.”

Substance of the proposed arrangements as follows:—  
 The existing court divided into *several chambers*, number  
 not yet fixed, each possessing the authority of the whole;  
*President* in each, not removeable at pleasure;—*plaintiff*  
*to choose his chamber.*

So far, so good, my Lord.—Reasons uncontrovertible—

1. *Benefit of dispatch*—Degree of dispatch increasing in  
 certain respects with the number of the chambers.

In how many different ways delay increases with the  
 number of Judges—at least when they are understood to  
 lie all under an equal obligation to take an efficient part—  
 (for your Lordships, with respect be it spoken, know how  
 to make these things easy to you) it were almost super-  
 fluous to inquire.

Time for settling the opinion of each—thence of the  
 slowest and most accomplished in the science of dubitation:  
 for in a Court, as in a convoy, the pace of the whole is  
 regulated by that of the slowest vessel. Think of ———,  
 my Lord: and if the whole world could furnish them,  
 conceive 15 ———s. Decorum forbids, notoriety renders  
 unnecessary, the filling up of these blanks.—Time spent  
 in discussions—in bolting out misconceptions, and clearing  
 them up, not to speak of wanderings, and in supporting op-  
 posite opinions. This, even where every thing is purity,  
 and *bona fides*. But should a *malá fide* suitor have need  
 of delay, and a single Judge out of the 15 be disposed to  
 give it him, then what end of doubts and misgivings, and  
 new points started and adjournments? But, my Lord, I  
 am trespassing all this while upon your Lordship's time,  
 and, like the fat man in the crowd, constituting the very  
 nuisance I am denouncing.—I conclude. Benefit of dispatch  
 produced:—*Ends of Justice* served, the *collateral* ends—  
 prevention of superfluous delay, vexation and expense.

2. *Benefit of æconomy*:—saving of delay and expense,  
 by expense of printing struck off:—viz. printing *plead-*  
*ings*:



*ings* : for, to the abuse made in this way in England and elsewhere of the art of writing, in Scotland they have found means to add the abuse of printing. Yes, law-presses broken up : at least if the number of Chambers (as your Lordship has been stated as inclining to propose) be as great as *three*. Three chambers give five Judges to a Chamber : only one more than in our Westminster Hall Common Law-Courts at present ; not one more than we had in them in former times : no printing of pleadings in England, nor the want of it ever felt or imagined.

But, my Lord, I am running wild again, and out-strip-  
ping your learned Reformer in the career of Reformation. For, upon looking once more, I find this œconomy is my own imagination all the while, not his proposition. The printing trade he has indeed noticed, but for what purpose ? —for the purpose of encouraging it, not cramping it. For in Resolution the 12th, for the use of the proposed new Court of Appeal at Edinburgh, printing is enacted : no where is it repealed.

3. *Benefit of competition* : viz. as between Chamber and Chamber, among all these Chambers. Ends of Justice served, all together, collateral and direct.—Saving of delay, vexation, and expense ; security against misdecision likewise.—Oh ! my Lord, how straight and how pleasant, when once a man has learnt to travel in them, are the ways of justice !

On the field here in question, in the benefit of competition, my eyes, weak as they are, have served me for distinguishing two branches. One consists in the multiplication of the shops, and the choice given to the customer, that is to the plaintiff, as between shop and shop : the plaintiff, if he is *bona fide*, if his wishes are honest, as, in the ordinary state of things, those of the plaintiff's are, for his own sake picking out the best. So far as this branch of the benefit is concerned, to be satisfied of the reality, and at the same time to understand the value of it, I see no need to look further, my Lord, than to Cocker's Arithmetic.

The other branch of the benefit consists in the influence of this multiplicity on the disposition and conduct of the dealers. In ordinary trades, in trades not subject to a monopoly, the nature and efficacy of this branch likewise is clear enough. But in the very particular sort of trade here in question, the great law-partnership—the competition so



nearly resembling that between the two shops kept by the same Cabinet-maker, one in the City, the other in Bond-Street—the process for extracting the true value of this branch of the benefit, does not appear quite so simple. In some instances indeed, I think I see a *positive* value. But in others, if my calculation be correct, the value of it is what the value of  $x$  is so apt to be, *negative*. Think, my Lord, of the competition between B. R. and C. B. and the fruit of it—imprisonment for debt on mesne process; upon the mechanical principle above explained, the Judge taking care to see neither party, and to know nothing about the matter, for fear of being obliged to stop a man in his way to jail, and so losing his profit upon the jail, besides so much time, and so many other of his fees.

On this part of the problem therefore, the calculation being somewhat intricate, and running up into the higher algebra, I will not attempt to trespass on the time of Cæsar with so long a sermon. Agreed about the measure, I see no practical use, in rummaging among the reasons for points of difference. But, should any occasion present itself, in which the benefit looked for from this source should be proposed, in opposition, and in the character of a substitute, to any arrangement, promising benefits, to my view of a less equivocal and more substantial texture, then would be the time for weighing the value of this part of the acknowledged benefit in diamond scales. Such as they are, I have a pair for the purpose, and they are at your Lordship's command at any time.

But, my Lord, as in some companies the more the merrier, so in all competitions, the more the brisker. Setting down this benefit at whatever it may be worth, this and the first together (I mean *dispatch*) from *three* do they not bring us on to *fifteen*?

But at number 15, or before, if any inequality of numbers be admitted, comes *single-seated judicature*, and with it a new, and in my view, in comparison of either, I must confess a still more important benefit; viz. *individual responsibility*.

A *Board*, my Lord, is a *screen*.—The lustre of good desert is obscured by it; ill-desert, slinking behind, eludes the eye of censure: wrong is covered by it with a presumption of right, stronger and stronger, in proportion to the number of the folds: and, each member having his circle of partial friends, wrong, in proportion again to the number, multiplies its protectors.

Of



Of the several branches of the public service, I would not positively undertake to say that judicature is, without exception, the one in which the advantages of individual responsibility operate in the strongest force: but where this force is at its least dimension, it can never be too inconsiderable for regard.

Other departments, for aught I know, there may be, the Treasury, for example, in which, emulation finding no place, and the scene lying necessarily in a closet, Board management may upon the whole be preferable. In *Lord Coke's* time, the Treasure being in a single hand, and that armed with a staff, Lord Coke finds a use for the staff: and says it is for keeping off sturdy beggars. But, under the softer manners of modern times, the screen may be found, for aught I know, (but your Lordship knows exactly) the more convenient implement. Imagine a Commander in Chief stalking in to the Treasury, in full *costume*, coat of mail and helmet, crying out *Your money, or your place!*—Coming to close quarters, a Lord Treasurer might find the staff break, sooner than the helmet:—but the screen might have its uses.—But, my Lord, what has all this to do with law and justice?

*Oh, but sir, this is all theory.*—Well then, my Lord, let us refer the matter to experience.

In Westminster Hall, two Courts of Equity:—one, the Exchequer, with 4 Judges in it: the other the Chancery, with but one. Thus to outside appearance, but in fact the Chancery includes two Courts: sometimes both on a level, sometimes one above the other: *as the Plaintiff's Attorney thinks fit to place them*: in the one the Chancellor: in the other the Master of the Rolls. Now this, my Lord, should it in your Lordship's opinion be among the “secrets worth knowing,” call (for your Lordship has power) call for the number of suits instituted in a year in each of the three respective Courts. Mean time, one thing I can take upon me to certify to your Lordship, I who have no power:—viz. that, of the two single-seated Courts, the one which has fewest causes, has more by a great many—and not only now has, but always had—(and I speak of those suits alone, in relation to which the competence stands on an equal footing) more, by a great many, than the many-seated Court.

In the English Court of Chancery, the authority has from time to time been vested in *three* Judges, under the name of *Commissioners* of the Great Seal. But, so often



as this treble-seated tribunal has been set up, so often has it been recognised as no better than a makeshift; and still the many-seated has given place to single-seated judicature.

So miscellaneous are the functions of the Lord Chancellor, that, to the maintaining this constant recurrence to simplicity, other considerations may have lent their influence besides that of its subserviency to the ends of justice. But from this surmise of other possible concurrent causes, no clear inference can be deduced: the effect, for which the advantage in respect of judicature is of itself capable of accounting, remains certain: and thus much may at any rate be inferred, that, from this so often repeated experiment, no indications were ever afforded, sufficient to produce a tendency any where to call, in that instance, for the permanent substitution of treble-seated, or in any other degree many-seated, to single-seated judicature. Of any such tendency I, for my own part at least, never met with any trace.

But, without crossing the Tweed, the home-bought stock of experience might, in Scotland, one should have thought, have afforded indications sufficiently conclusive, in favour of the proposition, that no superior prospect of advantage to justice is held out by many-seated, in comparison of single-seated judicature.

Eight-and-twenty Sheriff's Courts, next in authority to the Court of Session, and in the aggregate covering the whole extent of the kingdom, all single-seated Courts. Even in the Court of Session itself, every thing, without any limitation worth adverting to, comes in the first instance under single-seated judicature: and what advantage has been derived, or so much as been thought to be derived, from the transference to many-seated judicature, let experience testify. On this head, whatever has been done, has been done in the way of reduction:—I speak of the riddance made of the Lords Extraordinary in George the First's time.

In Edinburgh itself, close under the eye of the same public that calls so loudly for the decomposition of the many-seated Court, there exists one of these single-seated Sheriff's Courts. No call has ever been made for the substitution of complication to simplicity in this instance: and how should this be, if any inconvenience were felt for want of it?

Ever since the Union, indeed—almost these hundred years



years—Scotland, as well as England, has had a Court of Exchequer: in England, a four-seated court; in Scotland a five-seated:—and of this experiment too, as far as it goes, the result is in favour of simplicity. Compared with the fifteen-seated Court, general suffrage appears to be in its favour: for no complaints against it have ever been heard, and now a slice of jurisdiction (I mean that which regards the *Teinds Anglicæ Tithes*) is proposed to be cut off from the many-seated Court, and given to the few-seated one. Many-seated, to be sure it is, in comparison of the single-seated Courts. But this proves nothing against simplicity: for in Scotch Exchequer judicature, there has been no single-seated Court to try against the many-seated one, as there has been, and is, in English Equity.

There are indeed the 14 single-seated Courts, with a Lord Ordinary in each: but such is the mode of being of these Courts, sometimes detached from the fifteen-seated Court, sometimes absorbed into it, that the distinctness necessary for comparison is not there to be found.

Out of five causes brought before the Lord Ordinary, he does not, it is said, pronounce a decision on more than one: the four others being, for mere want of time, handed up by him to the Inner House, before any considerable portion of his labour has been expended upon them.

At its institution, Anno 1532, why was the court so crowded as we see it?—because France was the model for every thing, and in France, judicature was thus crowded. In France how came judicature to be thus crowded? Because the sale of the seats was an object of finance. From this sinister interest came the custom: from the custom, the prejudice: and that prejudice so strong, that it became a sort of axiom—that if in any instance the ends of judicature failed of being fulfilled, it was for want of a sufficiently great multitude of Judges. We have a book, my Lord, on this subject, by *Condorcet*: a quarto volume with 460 well-filled pages in it: all algebra, all demonstration; and his axiom (preface p. 24.) a basis of it.

*Sieyes*, in one of his plans, improved upon this: and, to combine learning with popularity, and compose a substitute for reason out of two blind prejudices, he set up in every little town, down to I forget what degree of minuteness, a Jury-box stuffed with lawyers: but, to feed this receptacle, and keep it constantly filled, after the requisite allowance for rotations, and radiations, and challenges, the quantity of learning, (not to speak of probity) with which he proposed



posed to enrich the territory of the Republic, and by what means the learning itself was to find the necessary *pabulum*, must be left for imagination to conceive.

Now then, my Lord, supposing that, by the evidence of experience, or, in a word, by evidence of all sorts put together, single-seated judicature were proved to stand no higher than upon a par with many-seated judicature, would not its title to preference be complete? *Il ne faut pas multiplier les êtres sans nécessité*, says a good French proverb: Is not this, my Lord, among the cases that fall within it?

If, in such a multitude of shops, there should chance to be here and there one, that should find itself without customers, even in this case there would be no harm done. The Judge whose learned leisure remained thus undisturbed, would be virtually in the condition of one, to whom his salary is continued in the character of a pension of retreat:—and to form an anomaly, not altogether devoid of curiosity, in the natural history of pensions, here would be so many of these articles of expenditure, the propriety of which would find itself attested by universal suffrage.

Another thing. Two additional many-seated Courts require each a President: and the Scotch as well as English of *President* is, if my dictionary inform me right, additional salary. This additional salary, your Lordship, in your quality of presiding guardian of the public purse, would find a delight in saving: besides the correspondent burthen of patronage, which, by Right Honourable persons in your Lordship's high and highly responsible station, has always been felt to gravitate with so severe a pressure. But a single Judge would no more admit a President, than, after a critical examination, the largest elephant in the world was found to admit of either a superior, or a rival, in himself.

I dwell on this topic the more distinctly, because in the succedaneous or supplemental plan, which I propose to myself the honour of submitting to your Lordship among my *Facienda*, additional salaries are so unhappily and inevitably abundant: I mean for the existing local Judges, to draw them off from the service of the technical Mammon, and purchase the whole of their time, for the service and benefit of justice: provincial Judges, obscure but useful drudges—28 (if I do not miscount) in number—who, from so high an observatory as your Lordship's, being too far distant to be viewed without a telescope, such as your Lordship's learned assistant has not presented you with, found no one to endeavour



deavour to bring them under your Lordship's notice, but a drudge still obscurer than themselves.

But to return from this digression. If England be so fit a model for Scotland, in respect of multiplication of Juries, why not in respect of reduction of Judges, and reduction, or rather avoidance of increase, of salaries?

The argument might be pushed further, by observing, that in the many-seated Courts, almost the whole of the efficient and honest part of the business—I mean the conduct of the *trial*—is performed by single Judges ;—that, of the business done in full court, by far the greater part is *made business*, business that, had the ends of justice been the ends of judicature, would never have come to be done : and that, of every three out of the four Judges, the best that can at any time be said, and more than can at all times be said, is—that they do no harm.

Take a man of commanding eloquence and character (such for instance as *Lord Mansfield* was) ; give him conceits (such as Lord Mansfield was said to have had) of putting himself in the place of King, Lords and Commons, and then see whether there may not be a convenience to such a Chief, in having for his supporters a train of ever-obsequious Puisne Judges. Then comes Sir James Burrow's triumphant unanimity ;—an unanimity not so flagitious indeed, but in other respects not much dissimilar, to the unanimity so regularly, and with so little expense, in addition to that of perjury, produced by torture, among Juries.

To speak plainly, my Lord, I really see but two reasons, if reasons they are to be called, for the putting of so many Judges in each chamber: one is, that there is a stock of learned materials that some how or other must be disposed of: the other is, that here are so many situations, which may be continued without complaint, because they exist already, and which it would be so delightful for a multitude of learned persons to look up to, and for some one learned person to have, as at present, the disposal of.

As to the first reason, I feel what is due to public decorum, combined with individual sensibilities. But, amidst such a number of persons at such a time of life, if there are not already, in the nature of things there can not but soon be several, to whom repose would be more acceptable than labour, especially labour so unremitted as theirs is universally described to be: and, without insisting on their being *killed off*, at any rate the supernumeraries may be suffered to *die off*.



As to the other reason, unfortunately it is not the less persuasive, for being incapable of being avowed: and to this, I must confess, I have no better reply to make, than what is contained in that project of my own, for improving the condition, and increasing the dignity and utility, of the provincial *Sheriffs' Courts*.

If what has been said, in behalf of individual responsibility and single-seated judicature, should not yet be found conclusive, materials are not wanting for ulterior and diversified appeals to experience, none of them without a precedent already in existence, all of them without addition to expense.

1. In one Court, *five* learned Lords, as in the existing Court of Exchequer—the Court which, in respect of the number of the seats, seems to have been taken as the model for the three proposed Chambers.

2. In another Court, *four* learned Lords, as in each of the three Common Law Courts in Westminster Hall.

3. In another Court—or, in one of the above, instead of the number above proposed, *two* learned Lords, neither more nor less, as in the *Welsh Courts*, each of them serving, upon occasion, to prevent the other from doing any thing: a result, that has now and then manifested itself, in the other Courts having seats, as above, in even numbers.

4. Moreover, if number *three* were regarded as possessing any properties peculiar to itself, number *three*, though unsanctioned by any particular precedent that I know of (unless the three seats occasionally substituted, in the character of a temporary makeshift, to the higher single seat in the Court of Chancery, be considered in that light) might find its exemplification along with any two of the numbers already mentioned.

In each case, there would still be learned materials enough left, for Courts, more than one, with single seats in them: and forasmuch as a course of experimental judicature is intended to be delivered, it were a pity that, if the joint evidence of theory and experience, in favour of single-seated judicature, be not accepted as conclusive, the experiments should not be diversified under as many forms as it is susceptible of.

Thinking *three* degrees of *jurisdiction*, whereof *two* of  
3
*appeal,*



*appeal*, numerous enough ;—Sheriffs Courts' and others in the Provincial Towns, Metropolitan Courts in Edinburgh, with concurrent jurisdiction as proposed, and House of Lords in the Imperial Metropolis (one more than in ordinary cases we have in England) quite sufficient ;—the existing *Inner House* therefore at the best a *superfluity* ; which, in degrees of jurisdiction, each swarming with delays, vexations and expenses, is as much as to say a *nuisance*—your Lordship sees already what my conceptions can not but be, of the proposed 5th degree of jurisdiction—the *Chamber of Review*.

But of this in its place : after which, and after I have humbly represented to your Lordship what *Representations* are, I propose to myself (I believe it will be in the *Omissa*) to submit to your Lordship by how many points the existing *Inner House* always has been, and, in whatever number of Chambers it were to come to be divided, still would be, worse than useless.

Meantime, at the bare idea of such a dissolution, I see their whole Lordships up in arms.—Actually existing *Inner House*, three projected *Inner Houses*—all vanished ! No Houses left but *Out-Houses* !—each learned Lord reduced to the condition of a mere Lord Ordinary ! the Lord President left with nobody to preside over but himself ! the two *bonuses*, the use and function of which was, to produce, on the part of the two leaders among their learned lordships, a conviction of the utility of the plan, an utility so transcendent as to outweigh even the mischief of innovation—these two all-composing anodynes both gone !

So redundant is the population of the *Inner House* found to be, when once any principle of reason or experience comes to be applied to it—so large the proportion of the mass that runs into *scoriæ*, when once put into this test—so raging the disease, so urgent the pressure, that even Mr. Malthus, with his inflexibility, and his bitter remedy, might find himself at a loss to cope with it. Submitting mine, I submit it rather for illustration, than for any serious hope of seeing it carried into practice. To give reception to it, the interest of suitors would be to be preferred to the *amour propre* of so many Judges : the whole interest of 1,500,000 unlearned, to that delicate and tender part of the interest of fifteen preeminently learned persons : the ends of justice to the ends of judicature :—and, in Scotland in particular, not to speak of other countries, was ever any  
G such



such preference, to any extent worth speaking of, so completely without a precedent?

As to the persuading a learned Lord to sit in a Court in which he would be sole Judge, instead of sitting in a Court of no wider, nor higher an extent of jurisdiction, in which he would be but one out of five, it is not there, if that were all, that I should be apprehensive of much difficulty.

The misfortune is that, of the jurisdiction at present exercised by the Court of Session, a great part, and, if I apprehend it right, by far the greatest, is jurisdiction *in the first instance*; so small being the proportion of the number of causes that receive a decision from the Lords Ordinary: and the business of the Bill-Chamber, it is to be hoped, not being sufficient, when added, to place the majority on that side.

At present, the population of this upper story of the College of Justice, with the exception of the Lord President, standing, the whole of it, upon one level, here would be a necessity for disturbing the equilibrium, and fixing it on two different levels, dividing it between an *upper* and an *under school*: and here it is not, as in the case of the two additional proposed Chambers, in which two learned persons are to gain, each a *remove*, their *fellows* remaining as they were; but a sort of turning down or degradation would be to be effected, of those who at present do *upper* as well as *under school exercise*, some being abased, and confined to under school exercise alone, seeing their fellows at the same time exalted, and set for ever above such inferior exercise.

Here then would be the rub. In some schools, where a pill of the bitter kind has been to be swallowed, lots have been cast to know to what part out of the whole number it shall be administered. But that has been *propter delictum*; which takes it out of the present case, and unfits it for a precedent.

In our Spiritual Courts the same learned person is found, I have heard it remarked, to act alternately the part of Judge and Advocate, coming upon the theatre of justice sometimes in the one character sometimes in the other, with the most amiable condescension, and with that facility and promptitude which is acquired, by practice. But that, on that or any other theatre of justice, any such custom has ever prevailed, as that of a Judge *ad quem* descending and coming on in the character of a Judge *à quo*, is more than I recollect an



an instance of: especially where the descent has not been occasional, alternating with re-ascent, but permanent and definitive.

The misfortune is—it is impossible to disguise it—that, not only on the existing plan, but on my plan, jurisdiction in the first instance is *Sheriff-Depute's* work: and, while any one of their Lordships had *appellate-jurisdiction* work to do, and that alone, to expect that any other of their equally learned Lordships should set his hand to Sheriff-Depute's work, would be an expectation about as extravagant, as that the house-keeper of any of their Lordships should set her hand to kitchen-maid's work, and undertake to wash the dishes.

In the *military* department, indeed, how often have we not seen, in histories at least, one General serving as volunteer under another, a senior even under a junior? But how different—how opposite, or rather disparate, in every point—are the two lines of service! In the one, a man hazarding his own life, to save life and every thing to his fellow-subjects: in the other, sitting upon a cushion to dispose of their's; not forgetting to secure a few pickings out of their fortunes to his own use. Honour the endowment of the soldier, learning that of the man of law. Are South and North more opposite than honour and law-learning—*law-learning*, with *falsehood* for the basis of it?

This then being hopeless—and whatever else may savour of self-denial, or sacrifice of personal profit, or vulgar pride, to public good, or to more refined and sublimated pride, from members of a body so placed, and so habituated, alike hopeless—(your Lordship will comprehend without difficulty with how much greater satisfaction I should see any such conception confuted than confirmed) it remains, that, for doing Sheriff's work, we should be reduced to men as yet unlorded, to men upon no higher a level than that of Sheriffs Depute.

Yet a time there was—and that at no great distance—at which a *Curtius* of this stamp might not improbably have been to be found. There lived an honest man once, even among their learned Lordships, whom they called *Swinton*—Lord Swinton:—the same whom, on a pilgrimage made by him, to England—like that of Herodotus to Egypt, or the fabled one of Anacharsis to Greece—to England, as to the seat of more antique and mysterious learning, *Judge Buller*, perceiving in the man a sort of an *excrescence* like your love



of justice, and looking upon him for it as an oddity, a species of *Howard*, like a man with two thumbs, or a calf with five legs, took upon himself to quizz: telling of him a good story, which I choose rather to leave for a *Bulleriana* or *King's-Benchiana*, than to entertain your Lordship with it.

In this man, judging of him from his pamphlet, which perhaps your Lordship may have seen, and which is all I have to judge him from, except the *Small-Debt Act*, for which if it be his, as it is said to be, thousands and tens of thousands born and unborn are bound to bless his name—in this man I should have expected to find a sort of *Scrub*, a Judge of all work, ready to serve Justice in any capacity, in which he could be made useful to her; and, (like another honest man far beneath him, whom, for different odd jobs, I may, in the course of these letters, have occasion to present to your Lordship's notice), without scratching his head for something to drink, or calling for increase of wages.

Not but that—could the plan of so unqualified a reformer, as he who thus presumes to obtrude himself upon your Lordships notice, present any title to acceptance—work, and that of a kind not to be disdained by any hand, would be to be found, for one at least of these indubitably learned, and supposed superfluous distributors of justice: work, in its nature somewhat different from their present occupation, but in dignity not inferior, and with an appropriate title. I mean that of *Inspector-General*—say, *Lord Inspector—of Scotch law*: but of him and his functions, in my short list of *Facienda*.

Moreover, if another of them would condescend to take *English*, and another again *Irish*, judicature, under his care, they would neither of them, I would venture to say, find in either field any want of matter meet for observation.

I have already ventured to confess to your Lordship, that, under the existing *fee-gathering* system, my expectations from the benefit of competition, so far as concerns one branch of that benefit, are far from sanguine. But, my Lord, since, upon my plan we have so many pre-eminently learned persons, each of himself a Court, and in the habit of being one, upon our hands, I will venture so much further as to submit to your Lordship one experiment, which, although there could be no sort of competition in it, would be but the more instructive. And, in proposing  
the



the experiment, so bold am I for this once, that, without any sort of pretension to the gift of prophecy, I will moreover venture to predict the result.

Let any number of Courts be set to proceed in the way of *natural* procedure. Let any other number (for shortness let us speak as if in each case there were but one) be left to proceed in the way of *technical* procedure, according to the existing practice.

Such being the experiment, now as to the result.—The result will be, my Lord, a separation of plaintiffs into two groupes—

*Bonâ fide* plaintiffs—every one of them, without exception, will go to the *Court of Natural Procedure*.

*Malâ fide* plaintiffs—every one of them, without exception, will go to the *Court of Technical Procedure*.

Every one of them—that is, if there be any:—if, with his motives upon his forehead, any lawyer—advocate, writer to the signet, agent—whatever be his nature, or his name—should be to be found, hardy enough to lend himself to a procedure, of which, where there is no other to be had, the oppression of the defendant will be the sole object, as well as manifest result.

To the Court of Natural Procedure will betake himself, every man who, wishing to have his due with as little delay, vexation, and expense as possible, is content, for the benefit of seeing the obligation of veracity imposed upon his adversary, to face him before the Judge, and take that same obligation upon himself.

To the Court of Technical Procedure, will betake himself, every man who, having a demand for the power of imposing upon his adversary a quantity of expense and vexation, and wanting delay as an instrument for letting in and laying on the vexation and expense—whether it be for the simple purpose of inflicting torment, or for the purpose of compelling, by the terrors of such torment, or the inability of enduring it longer, a surrender of the Naboth's vineyard, by which his concupiscence has been provoked;—having an effectual demand, I say, for this *jus nocendi*, and being content to torment himself for the advantage of applying corresponding torment to his adversary, goes of course to the only *officina justitiæ* where *jus nocendi* is to be sold.

As to the Court of Natural Procedure, and the destiny that will await the causes introduced into it, I can venture to submit an estimate, not unworthy of your Lordship's notice.

A little



A little less than *a third*, or some other such large proportion of the whole number of causes, will receive their decision on the first day, and *after one appearance* on both sides:—a little less than *another third*, on the next day, the defendant having made default the first; but still *with but one appearance* on each side, or with but one appearance, and that on the plaintiff's side:—a little less than the remaining *third*, still on the second day; though, in this case by adjournment; and thus *with two appearances* on each side.

I speak from a twenty years experience, acquired in a *Court of Conscience*, of which in another place: and presently your Lordship shall see—if not an estimate, an expectation—from much higher, indeed from the very highest authority, and still more favourable.

Other suits there doubtless are, to the delay and expense of which, as resulting from some assignable cause or *causes of complication*, a *Table* of which is hereto subjoined, even under Natural Procedure, no such limits as the above, nor even any determinate limits, can be assigned. But these would most assuredly not amount to a tenth part of the whole number of civil causes of all sorts, those included which cannot now come, as well as those which can and do come, under the jurisdiction of the *Courts of Conscience*, or say of the *Small-Debt Courts*.

Among these suits there are some, in which the use of *writing*, in the first instance, will be necessitated by the circumstance of *distance*. But, that the exercise of the *jus mentiendi* is not necessarily attached to that of the art of writing, is known even to English Equity. For all these *extraordinary* cases, (for such they are in comparison of the bulk of causes that would come for justice if it were to be had,) full provision is accordingly made in the plan, the outline of which will be submitted to your Lordship, in the *Facienda*.

But here another difficulty presents itself. After travelling, and so much at their ease, and through the whole course of the learned part of their lives, in the road that leads to the ends of judicature, their Lordships would be apt to find themselves a little awkward, it may be feared, when set to travel in so new and strange a road, as that which leads by the shortest cut to the ends of justice.

My Lord, I feel the force of the difficulty; but nothing but absolute necessity shall make me regard it as insuperable.

Various expedients present themselves. There are schools  
in



in which grown gentlemen may learn to dance. There are schools in which grown Judges might learn to do justice.

Each learned Lord has *servants*: most of their learned Lordships have or have had *children*: to whom, in case of any little transgressions or disputes, such as will sometimes present themselves in all families,—to whom at any rate (I speak of the children) if not to the servants, he will have been desirous to do, and will accordingly have done, justice.

Each learned Lord, or at any rate almost every learned Lord, has or has had a *lady*, whose learning, let us hope, if she has any, bears no resemblance to his own. If in that domestic tribunal he has not been in the habit of exercising the judicial office himself, or even if he has, let him put himself under her tuition for a while; behold in her *rules and orders* a set of *acts of sederunt*, to which I will not do any such injustice as not to suppose them better than his own, and read in her fair hands his improved *book of practice*.

Should that course of schooling, in the instance of this or that learned tyro, fail, or be found insufficient, let him follow the precedent, though not literally, set as above by the good Lord Swinton. Let him betake himself—not to a *jury-box*, as Lord Swinton did—he will not find there exactly what he stands in need of—but to the nearest Scotch Small-Debt Court:—or if, looking upon a visit to any such neighbouring school, as a sort of remedy for his leprosy, too near akin to a dip in the river Jordan, he does not, any more than Lord Swinton, grudge crossing the Tweed, let him repair to *Birmingham*, and put himself under the tuition of Mr. *Hutton*, whose amusing as well as instructive account of the proceedings of the *Court of Conscience* there, as carried on under his presidency, is lying on the table before me; and who, if applied to by any man in that elevated station, will, I am certain, not refuse that information, which in my obscure and humble station he has granted to me.

But, not to impose on every one of their learned Lordships the necessity of any of these wild pilgrimages, there exists, (if on a hasty glance I comprehend this part of the *carte du pays* right), there exists in that spacious mansion called the Outer House, including in itself so many mansions, one in which there sits a learned Lord, called the *Lord Ordinary on Oaths and Witnesses*. On him is imposed, I see, on particular occasions, the degrading function  
of



of sitting to receive, in their own proper, or rather improper persons, the *canaille* of suitors \*. There he finds himself now and then obliged, for I believe he finds it impossible to escape from them altogether, to hear them and examine them, and thus to get from them the truth, in its native crude and impure state, without having it refined, and double-refined, and treble-refined, by being percolated through the lips and pens of Commissioners and Commissioners' Clerks, and Agents, and Writers to the Signet, and Advocates, and Court-of-Session clerks of so many sorts and sizes. In this *ergasterium*, if I understand the matter right, it falls to the lot of each of their Lordships (the President excepted) in his turn to drudge. If then, after drawing the truth, or whatever is given for truth, in this crude state, and from whatever sources it is to be had from, and that at the very outset of the cause, and from both parties at once, and without a syllable previously written by professional lawyers of either side, or at any other time, unless it be worth while, as the parties and witnesses, if any, speak, to set down what they say,—if, with these little variations, he can prevail upon himself to decide upon the evidence at once, instead of setting it, or something that passes for it, to be committed to writing, to be decided upon by some other Judge, who has heard nobody, seen nobody, and knows nothing about the matter, he will have judged, under the system of *Natural Procedure*, whether he knows it or not, as truly and scientifically as it ever happened to *Monsieur Jordan* to talk prose.

Can the utility or the practicability of the natural system admit of doubt? Let us call authority then to solve it, my Lord, and let us look up at once to the highest in this line.

Even Mr. Hutchinson—I should have said his right honourable Corrector of the press (p. xiv.)—the Lord President—speaking (p. 116.) of the Scotch Small-Debt Courts (Courts of Natural Procedure) admits, that the mode of procedure there pursued, parties present, no *mendacity-licence*, is “MOST EXCELLENT;” (pp. 116, 120, 123, 125.) meaning for a debt of 5*l.*:—of course for a debt of 50*l.* if incurred at ten different times. The same learned gentlemen are indeed equally clear, that the self-same mode of procedure, or at any rate that the self-same courts, are stark naught for a debt of 5*l.* 1*s.*:—“it is plain” (say they p. 129.) “that in this country the sum could not at

\* Bell, vi. 107.



“ present, with propriety, be raised above 5*l.* sterling.” Add a shilling to the 5*l.*, thereupon comes the necessity of a determination on the part of the Judge never to set eyes on the parties, coupled with a determination to read or pretend to have read lawyers’ scribble, heaped together in volumes, printed with the benefit of the mendacity-licence. As to the distinction itself, nothing can be clearer: but as to any ground for it, relation being had to the ends of justice, nothing of this sort is attempted to be given, nor ever will, the task being upon the face of it an impossible one.

In vain would it be to say, when you get above 5*l.* *learning* is necessary, and learning is not to be found among non-lawyers, the noblemen and gentlemen, who sit and act as *Justices of Peace* in these Small-Debt Courts. This being admitted, (not that the connection between *height of value* and *demand for learning* has place in so many as a fifth part even of the causes *above* that value)—this however being admitted, still the ground would be never the stronger: draw the boundary line where you will, still it would remain to be proved, that while truth is sufficient to justice below the line, mendacity is necessary above it. The *mode of inquiry* pursued in the system of procedure, is one thing; the description of the *hands*, by or under which the inquiry is conducted, and justice or something that is called justice is administered under that system, is another. Whatsoever repugnancy learned minds may feel, at the idea of pursuing, with truth before them, the only course leading to the discovery of it, the bar is of their own making: learned feet, could they be prevailed on, are no less capable of pursuing that track than unlearned ones.

So in regard to *space* and *time*. In the one case there is a straight road of a mile long, and without a turnpike in it: in the other case, you may go to, or at least towards, the same place by a road of a hundred miles in length, full accordingly, of turnings and windings, full, moreover, of quicksands and pit-falls, and equally full of turnpikes. In conducting the traveller, nothing obliges the conductors to avoid the straight road, and drag him along the crooked one: nor would they ever have given themselves any such trouble, had it not been for the turnpikes, the tolls of which are so regularly settled, and the tills in such good keeping:—learned feet, could they be prevailed on, are no less capable of treading the short road than unlearned ones.



As to our learned author, so long as the travellers are "*low people*," and unable to pay turnpikes, he is content that they shall be let into the one-mile road, where there are no turnpikes. But, as every thing that begins must begin somewhere, his calculation is—that where the value of the article to be travelled in quest of, begins to rise above 5*l.*, there begins the influx of your respectable sort of people, who are able to pay the turnpikes. Then accordingly comes the time, for shutting up the bowling-green one-mile road, which is without turnpikes, and opening the bone-setting or bone-breaking hundred-mile road, crowded all the way with turnpikes.

"It is not" (says he, p. 137,) "*without some very good reason assigned*, that the court is to be delayed from one day to another, but each day's roll ought to be determined, if possible, at one *sederunt*: as the loss of time, besides the injury to the community, is a very serious evil to persons in the *lower ranks* of life, *for whose benefit this act was principally intended.*"

Every day, every mile, beyond the first, is grudged (your Lordship sees) by the humanity and justice of these learned gentlemen, where the persons *detained* are low people, *out of* whom nothing, or at least nothing worth stooping for, is to be got, and the persons *detaining*, are unlearned people, *by* whom nothing is ever got, and for whom nothing is intended. But no sooner do your respectable people come up—bang goes the gate of the one-mile road in their faces, and they find themselves thrust into the hundred-mile road (with more propriety I might have called it the 500-, or 1000-mile road)—while Humanity and Justice are as fast asleep, as ever London Watchman was, at his stand. In the one case, not a single day's delay will learned gentlemen endure to hear of, "*without some very good reason assigned*:"—in the other case, days of delay by hundreds, not to say by thousands, insisted for, and not an attempt to assign so much as the shadow of a reason.—But *nemo dat quod non habet*.

Thus it is, that, till that explanation shall come, of which your Lordship will judge whether it can ever come, your Lordship has not only reasoning, which, (being my reasoning, and without any intrinsic authority for its support) is worth so little, but authority, which, (including, as it does, the authority of the Right Honourable President) is beyond all price, for being persuaded, that the natural system of procedure is "*most excellent*," and even for  
causes



causes of all sorts and sizes : at any rate, if administered with the benefit of that learning, which, if properly commissioned, nothing but its own diffidence, (shall I say ?) at any rate its own reluctance, can prevent from administering justice in this “most excellent” mode, in which unlearned gentlemen administer it without difficulty, and so much to the satisfaction of their learned superordinates.

Their satisfaction—yes, my Lord, and their delight. For it would do your Lordship good, to turn to Mr. Hutchinson’s book, and see, with what energy these learned persons, over and over again, plead the cause of Natural Procedure, as personified in these Small-Debt Courts, always supposing that at the exact sum of 5*l.*, she makes a full stop : by how rich a fund of virtue, in the shape of candour, disinterestedness, devotion to the laws, love of justice, and I know not how many other shapes, all that eloquence has been fed. But, until that explanation shall come, which can never come, it may be worth your Lordship’s while to consider, lest the force of such high authority should act in a wrong direction, whether *necessity* was not the material of which all that virtue was composed, and whether the real object were not, (seeing that what was done could not be undone) to stop the unprofitable system from going further ; and, for that purpose, upon the strength of so much virtue, to obtain credit for the insuperability of that inestimable bar, of which no description was given, because it was not to be found.

A circumstance which does not tend to weaken this suspicion, is the care taken to bolster up this bar, by the hack epigram, made by Montesquieu, and retailed by Blackstone, in which the idea of incompatibility as between *justice* and *liberty* is insinuated : a piece of sophistry which, whether in design or no, may be set down as being, in tendency, one of the most mischievous that wit was ever employed in varnishing ; and which, before I close this address, I feel myself strongly tempted to strip of its varnish, that lawyers in general, and especially lawyers to whose authority height gives weight, may, by shame, and fear of public indignation, find themselves estopped from using it.

Four and twenty thousand six hundred causes in little more than eight years, making 3,075 causes in a year, is the number stated by the Mr. Hutchinson and his Right Honourable collaborator (i. 144.) as determined in one alone of two Small-Debt Courts “in the Edinburgh  
“ districts alone of the county of Edinburgh, exclusive of



“ the two other country districts :”—population 82,560, as per returns printed by the House of Commons; viz. if my conception of the districts meant to be designated by him be right, of which I can form no assurance; but, take it in any way, to the purpose of the conclusion there will be little difference.

Number of causes of the same description afforded by the whole population of Scotland, setting down at 0 the causes determined by the other Edinburgh Small-Debt Court, but supposing the whole population of Scotland equally fertile in suits - 59,540

Numbers of “ new causes introduced per week into the Court of Session” (as per Edinburgh Review January 1807, p. 469.) “about 150 or 200,” (say then) 175

Making per year, supposing 26 of these weeks in a year, (vacation times excluded) - - 4,550

Now then, my Lord, if the mode of procedure pronounced “most excellent,” by that Right Honourable and most competent Judge be not to his belief most excellent, how can he justify himself (ask him, my Lord) in certifying it to be most excellent, in these 59,540 cases? but if it be so excellent (always saving and reserving to him the benefit of that distinction which will never come) how can he justify himself, in opposing the ineffable and unsurmountable bar, to the extension of this most excellent mode to the 4,550 causes?

One observation more, my Lord, to save learned gentlemen the trouble of seeking support in a straw, which would break in their hands as soon as touched.—In vain would it be to plead in bar to the *personal appearance* of parties, the *vexation* it would be attended with.

1. The vexation which you grudge not to impose on 59,540 persons, shall you grudge the imposing it on 4,550?

2. The vexation which does not preponderate against the advantage in so many other shapes where the *value* at stake is no more than 5*l.*, shall it preponderate where the value at stake is 10, 100, 1000-times as much?

3. The vexation which you never grudge imposing upon a man where the cause he is to attend upon is one in which he has no concern (I speak of *extraneous* witnesses) shall you



you grudge the imposing it upon him where the cause is *his own*?

4. Thus the matter would stand, as between *one* man in the character of a party, and another man in the character of a witness. But, my Lord, who does not know, that frequently the appearance of a single man, in the character of a *party*, will save the appearance of *any number* of men in the character of *witnesses*?

5. The vexation attached, under Natural Procedure, to the personal *attendance* of a party before the *Judge*, is less than that portion alone, of the vexation attached to Technical Procedure, which consists in the attendance necessary to be paid to *his own lawyers*.

6. Vain and groundless will be seen to be every use that can be made of the article of *vexation*, in the character of an objection to natural, as opposed to technical procedure, when it is considered, that of the vexation attached to litigation in general, and in particular of the portion attached to attendance of parties, little less than the whole was *factitious*, the produce of the industry of the predecessors of learned Judges, made by them in conjunction with one set of their partners, viz. *mala fide* suitors; who, for the part borne by them in it, get payment—plaintiffs, as above—defendants, also as above, besides the benefit of delay :—*factitious mischief*, made by the *managing partners* on purpose, in order to force men, as they did, injured and injurers together, into the hands of another division of the partnership,—the hireling and naturally treacherous assistants and substitutes of the parties.

The effect was produced—partly by swallowing up the local judicatures, and thus enhancing the vexation and expence of *journeys*;—partly by encouraging *sham excuses*, for non-appearance, called *essoigns*, and multiplying incidents *ad infinitum*, and so enhancing the vexation and expense of *demurrage*;—all this, in a state of society, which afforded neither roads, nor carriages, nor lodging-places, nor safety any where.

In my first letter, in hanging up the two companion-sketches of Natural and Technical Procedure, I had occasion to state this;—and now, to prove it, I call the Right Honourable the Lord President.

But, my Lord, his evidence, (your Lordship sees) is already



ready *half* given:—*a single day*, viz. a few minutes in that day, is all the time he says (as above) that a cause ought to last in general, and setting aside the extraordinary cases. There is the *half* that has been already given: the other half, that remains to be given, consists in an estimate of the *number* of days, *minimum*, *maximum*, and *medium*, which the same individual cause, that ought to be, and commonly is, dispatched in a small part of a day, by unlearned Judges, (parties being present at the outset) would be drawn through, in the hands of those learned persons over whom he presides:—be drawn through—I mean, in the several cases of its visiting the 1st, the 2d, the 3d, and the 4th, of those *degrees of jurisdiction*, to the number of which, as not being yet sufficient, it is now proposed to add a *fifth*.

It is not without pain, believe me, my Lord, that I feel myself obliged to come to such close quarters with my learned adversaries, if such they are to be, and to apply a scrutiny of so rough a texture, to a book which commands my admiration by so many titles. But, if I thus treat them as adversaries, it is for the purpose of converting them into allies:—and, labouring under such a load of disadvantage, contending against principalities and against powers, having a great battle to fight, and but one pair of hands, and those very weak, to fight it with, prudence will not suffer me to neglect an advantage so eminent and so rare.

Nothing, my Lord, do I impute to these two learned persons, or either of them, that I do not find myself equally obliged to impute, as the effect of the original sin of the whole race, to all the *Inns*, whether of *Court* or *Chancery*, as well as to the whole *College of Justice*.

Ah, my Lord!—if your Lordship could but prevail on the Lord High Chancellor, or the Lord Chief Justice of all England, to write a book, or what comes to the same thing, to give a “regular revisal” to one, “sheet by sheet, without one exception,” to a book, I mean, showing how every thing is as it should be, and, in particular, how Jury-trial, *placed* and *ordered* as it is, is a boon so perfect, as to “*excite astonishment at the blindness that can hesitate about acceptance* :”—could your Lordship, by any entreaty, obtain for England a lecture *ex cathedra*, correspondent to that which has been so generously and spontaneously bestowed upon Scotland—ah, my Lord, what sport should you then see!

But



But to return to my experiment ;—a *competition*, if such it must be called—not between *Judge* and *Judge*, both under the same system, but between *system* and *system*, technical procedure and natural procedure. Here would be an experiment indeed, my Lord :—a true *experimentum crucis*.—Has your Lordship nerves for it ?—*Fiat experimentum* was the favourite *dictum* of that Chancellor, who, I presume, had his seat in the Cabinet of that day, and who was at once the father of philosophy, and the legislator of legislators. *Fiat experimentum* was the language of Lord Chancellor Bacon. Would it be the language of Lord Chancellor Erskine ?



LETTER III.

*Proposed System of Pleading.*

IN the present letter I propose to say what little there seems at present any use in saying, in the little that, on the subject of *Pleadings*, I find said in Resolution the 5th,—the Resolution which takes that subject for its theme.

“ RESOLVED,

5. “ That in all Causes, whether originally brought before  
“ the Lord Ordinary, or before the Chambers as Inner House  
“ Causes, the Defender shall, in his Defence, *distinctly* admit  
“ or deny all relevant Facts alleged in the Summons or other  
“ Writ by which the Cause is brought into Court.”

Further on, my Lord, I observe profession ample, and yet performance scanty :—but where what is professed is nothing, what can be expected of performance?

Of this profession the manifestly professed object is diminution of factitious delay, vexation, and expense : viz. in so far as the defendant's share in the process called, in English law, *pleading*, is concerned.

Now, my Lord, were it really an object to do away, or diminish, the factitious part of that aggregate mass of inconvenience, learned gentlemen would not, could not be at a loss. Admit, compel even, both parties, in the first instance, into the presence of the Judge : sending them, however, not from the Orkneys to Edinburgh, but from the Orkneys to Kirkwal. Scotland has the happiness of possessing already a set of *local* Courts, by which the Scotch Metropolitan Courts stand divested of the pretence, which the English ones have made to themselves, for turning a deaf ear to that first principle of justice. Admit them ;—but under that security for veracity, which is never refused, in the case where temptations to the opposite vice have no existence :—which is never refused in the case of the most unexceptionable *extraneous* witness :—take away in a word the *mendacity-licence*, as it is already taken away in those Civil Courts, where justice, in all its shapes, is *really* the object—in the English *Courts of Conscience*, and in the Scotch *Small-Debt Courts*.

Do



Do this, and all "relevant facts" will really be either "admitted or denied:" and on each occasion, with whatever "*distinctness*" the ends of justice, in the opinion of the Judge, require: if the first word is not distinct enough, he calls for a second: and so on till he gets one that he looks upon as adequate to the purpose: being exactly what happens, where a man is heard and examined, and cross-examined, in the character of an extraneous witness:—and (what is more), along with the *distinctness*, you will get *truth*: at least as surely as you could expect to get it from an extraneous witness;—that truth which would so ill accord with the interest of the learned framer of the Resolution, and his learned partners, and which accordingly he does not so much as profess to aim at.

What?—Put an end to *Written pleadings*?—Rob us of our business?—Knock up our profession?—Substitute Turkish to Scotch and English justice?—Whence comes this man?—from the Jacobin Club, or from St. Luke's?—Loud laughter among learned Lords and Gentlemen:—but will Lord Grenville join in it?

The defendant *shall* (says the learned Reformer) be "distinct" in his "admissions and denials."—What? does it depend upon him then, my Lord, to give distinctness to the language of a man he never hears? and, in a word, of every man? Yes, if he were a Judge, with the Defendant before him:—but that is the very thing which no learned Lord or Gentleman can ever bear to think of.—And yet he commands, and in commanding, undertakes for, and predicts distinctness.—Now then, my Lord, let us see what are the chances his prediction has of finding itself fulfilled. As often as the Defendant is *in malá fide*, which in the most common sort of cause (debt) is most commonly the case, it is the interest of that one of the *parties* that there shall be no such distinctness: be he in *malá* or in *boná fide*, such at any rate is the interest of his *lawyer*: and in these two it is—but in an infinitely greater proportion (taking the suitors in the aggregate) upon the lawyer, that distinctness depends. Now then as to the chance of fulfilment, how stands the matter *at present*?—No distinctness at present;—for it is the want of it that is the very grievance to be remedied:—how as to the *future*?—though distinctness is the sole object, nothing is so much as proposed for promoting it in future:—and yet the learned Reformer, with his prophetic as well as imperative *shall*, makes sure of it.

The learned Gentleman, who has distinctness at his command,



mand, had he begun with giving it to his own conceptions and expectations, might it not have been of use?

On occasions of this sort, my Lord, there is a something, which, without the aid of learning, common sense is pretty much in the habit of doing, towards securing *distinctness* in respect of *admissions and denials*: and that is—whatever, having been asserted on one side is not denied on the other, to set down as admitted: and whatsoever, being attempted to be denied is not denied with sufficient distinctness, to set down that too, upon occasion, as not denied but admitted. Such is the practice, my Lord; and that not only where common sense is happy enough to continue unoppressed by learning, but even in the midst of learning, and in spite of it:—for example in all reciprocating *affidavit-work*, not to mention other instances.

Had he gone thus far, and said—Whatsoever relevant facts, being alleged in the (Plaintiff's) summons, &c. are not denied (or are not distinctly denied) by the Defendant, in his defence, shall be regarded as admitted—by so doing, something might perhaps have been done: done, I mean towards the apparently professed object—the abridgment of these Written Pleadings, with their *io, mio, and arrio* of delay, vexation, and expense:—and this too, though perhaps not altogether without cramping, yet certainly without knocking up, the learned trade.

I speak, my Lord, taking the matter upon the footing of the French *Chevalier d'industrie's* position—*Monseigneur, il faut que je vive*: and setting aside, as surplusage, the *Lieutenant de Police's* reply—*Monsieur, Je n'en vois pas trop la nécessité*.

The case is, my Lord—as, I hope, I may now say your Lordship sees—that, so long as Written Pleadings, especially in the Scotch style, continue to be received—without *oath* or equivalent security, or faculty of *counter-interrogation*—it is the interest of those on whom it depends, and it depends on those whose interest it is, that there shall be no end to them on either side, nor therefore any distinctness in them or truth:—and it is in this state of things that the learned Reformer undertakes, by his *fiat*, to infuse distinctness into all conceptions and all pens.

My Lord, on this subject there is a supposition which I really know not how to get rid of, and which is, that in presenting to your Lordship this his recipe for the cure of indistinctness, the learned practitioner must have represented himself as doing something which had not been done before.



before. Never, surely, could he have said to your Lordship—this my *nostrum* is one of the *powder-of-posts* which the *Pharmacopœia Juridica Edinburgensis* is full of—which we have been administering every day for these twenty years, and which has never yet been found to have any more effect than it was designed to have. No, my Lord; this could never have been his language:—what he must have said, is—this is a *new preparation*, which will now come to be tried for the first time, along with the other novelties.

Such was the character I had of course ascribed to it. Judge, my Lord, of my surprise—a surprise, in which I should expect your Lordship would not be altogether without a share—when, in rummaging among the Acts of Sederunt, I found a part of one, and of so recent a date as 11th August 1787, in these terms:—“When the Defendant receives the Summons, he shall therewith return, upon a separate paper, his whole *Defences*, both dilatory and peremptory, stating the facts he is to insist upon, and *explicitly admitting or denying* the several facts set forth in the Pursuer’s libel.”

To be sure the tenor is not precisely the same: Anno 1787, *explicitly*; Anno 1806, *distinctly*:—but whether in purport, there be any material variance, your Lordship will judge.

Now then, my Lord, this law of the Scotch Judges, is it acted upon, or not? If acted upon, your Lordship sees what has come of it: if not acted upon, but neglected, what security does the Resolution give—what security is it in the power of the learned Author to give—that the neglect will not continue? As to neglect, your Lordship will please to observe, that it is no more than has happened to many and many a law, of more substantial texture. For, my Lord, in the Court of Session, the very carpet they tread upon is made of shreds of laws, enacted, broken to shivers, lying one upon another in heaps, unabrogated, unre-moved:—a carpet, than which none was ever softer, to the foot of a corrupt or partial Judge. But of this among the *Omissa*.

All this while, if by *Pleadings* are to be understood demand, with *particulars* and *grounds* of demand, on one side—*admissions* or *defences*, with *grounds* of defence on the other—think not, my Lord, that if it depended upon me, *Written Pleadings* would be no more. On the contrary, *printing*, where properly managed, being a cheaper mode



mode of *writing*, great and constant use would be made of them : though, unfortunately for their reception, upon such terms as would be of little use to Pleadors.

But, my Lord, without a body of *substantive* law to stand upon, *a system of pleading is a superstructure without a foundation*. Without this basis, an edifice fit for any better purpose than that of a labyrinth, for harpies to burrow and fatten in upon the blood of suitors, is an impossible work :—on this basis, foundation and superstructure together, comparatively an easy one :—but of this in the *Facienda*.

Yes, my Lord : speak the word, and *a body of law, with a system of Pleading raised upon it*, you shall have. Comyns, title *Pleader*, shall be taken into the Laboratory. It shall be thrown into the roasting furnace ; the arsenic, 60 per cent, will fly off in fume :—it shall be consigned to the cupel ; the lead, 30 per cent, will exude out, and repose for everlasting in the powder of dead men's bones. The golden button, 10 per cent, shall be gathered up, my Lord, and made the most of,

On the present occasion, with the benefit of second thoughts, I spare your Lordship's indulgence no light load, which, under a first impulse, I had destined for it, about *Issues, general and special, Summonses* in the Scotch style with *libels* in the belly of them, and Scotch *Petitions*, and English *Declarations* and *Pleas*, and English *Assumpsit, Trover*, and *Ejectment*, and Scotch *Ranking* and *Sale* ; and the existence in Scotland of the equivalent of English *Declarations*, and the non-existence of the equivalent of English *Pleas* :—and the original old English Castle of *Chicane*, and the new wing *added* to it in Lord Mansfield's time, (for in business *addition* is as welcome as *subtraction* is invidious) to wit, under the name of "*Particulars*," and so forth. How fortunate is it, for one of us at least, that the discovered nihility of this part of the learned Improver's basis, saves me from the task, of seeking to load it, with any such superstructure !



LETTER IV.

*Proposed Trial by Jury.*

WRITTEN Pleadings, my Lord, with the benefit of the mendacity-licence—the assumed necessary foundation of Jury trial—being thus provided for, we come to the superstructure.

RESOLVED.

6. “ That if the Defendant shall, in Whole or in Part, deny  
“ the Facts stated by the Pursuer, or shall in his Defence make  
“ any Averments, in point of Fact, which shall subsequently be  
“ denied by the Pursuer, the Court or Lord Ordinary respec-  
“ tively on the Requisition of either Party, or the Court at their  
“ own Discretion, shall order that the Issue of Fact shall be  
“ tried by a Jury, except in such Cases as it shall be found pro-  
“ per to except from this Rule.

7. “ That when it appears to the Chamber, or to the Lord  
“ Ordinary, reasonable that such Issue so directed shall be tried  
“ in that Part of the Country where the Evidence can be most  
“ easily obtained, it shall be competent to remit the Causes to  
“ the nearest Circuit, to be there tried by a Jury.

8. “ That whenever in the inferior Courts Proofs shall have  
“ been allowed, it shall be in the Option of either Party to apply  
“ to the Court of Session, in order that the Issue may be tried  
“ by a Jury, if the Court shall so think fit. But if neither Party  
“ apply for the Trial by Jury, the Cause may be decided by the  
“ inferior Courts, according to the Forms now in use, and after-  
“ wards in review by the Court of Session by Jury, or otherwise  
“ as the Court shall think fit.

9. “ That it shall be competent to Parties to complain against  
“ Verdicts of Juries, that the same were given contrary to Evi-  
“ dence, or by Misdirection of the Judge sitting as Ordinary, or  
“ on the Circuit, or presiding in the Chambers.”

Before I proceed upon the learned Reformer’s plan about Jury trial, permit me, my Lord, to submit in the first place, and—Scotland, not England, being the proposed scene of action—without reserve, the use which, on my plan, would be made of that security, in *civil* suits.

In



In the 2d instance, or degree—call it *New Trial*, as being after a former one, though before another judicature—call it *Appeal*, as being from the decision pronounced by my single Judge, on the Trial carried on by and before himself alone—I would have *all* causes, so far at least as concerns the question of *fact*, capable of being brought before this species of tribunal: the first trial being, of course, supposed to have been carried on in the *natural* mode; as in the English Courts of Conscience, the Scotch Small-Debt Courts, the Courts in both countries composed of Justices of the Peace, acting on *civil* occasions (as in some instances they do) out of General Sessions—and so forth.

In the 1st instance, I would *not* have *any* civil cause ever brought before a Jury: either of course, or, as proposed in the Resolutions, at the instance of a Party, or by order of the Court.

And now I will submit to your Lordship, as shortly as I can, why I *would* have Jury trial in *all* causes in the 2d instance, and at the same time why I *would not* have it in *any* civil cases, in the 1st instance: it being all along understood, and carefully remembered, that the decision in the first instance has been come to in the *natural* mode.

1. Trial by a Judge, a single Judge, is the original, domestic, natural, most simple mode: as such, it ought not to be departed from without some special reason.

2. Trial with the addition of a Jury has for its inseparable accompaniment more or less of additional inconvenience, in the shape of *delay, vexation and expense*.

3. Jury trial, therefore, can not be subservient or reconcilable to the ends of justice, any further than as it affords an additional *security against misdecision*, including, what is equivalent to misdecision, *failure of justice*.

4. That it is capable of being made to afford a highly valuable *security against misdecision*, I admit, or rather I aver, and am ready upon occasion to maintain: but, as this is admitted on all hands, to argue it here would be superfluous.

5. That it affords a general *persuasion of security against misdecision*, is also admitted on all hands: and therefore  
need



need not here be argued. And this advantage, though intimately connected with the other, is perfectly distinct from it, and abundantly more valuable.

6. Its affording any additional security, depends upon its being thought to do so, by one or other of the parties: they being, as to this point, in each individual instance the only persons competent to judge. If, in the decision pronounced by a single Judge, there be not in the opinion of either party any misdecision, *i. e.* if neither of them be dissatisfied with it, no other person can have any reasonable ground for supposing any: and if no misdecision, no additional security against misdecision can be of any value.

But neither a suitor, nor any one else, can have any rational ground to be dissatisfied with any decision—with a decision formed by a single Judge—till he knows what it is.

7. Upon the same causes, will the general *persuasion* or *opinion* of security against misdecision, as obtainable from Jury trial, depend.

8. Therefore, in respect of security against misdecision, Jury trial, in the 2nd instance and not before, is *not less good* than Jury trial in the first instance.

And now I will submit to your Lordship why, in respect of security against misdecision, Jury trial, in the 2nd instance and not before, is *better* than Jury trial in the 1st instance.

I. In whatever cases, if any, it is neither necessary nor possible that Jury trial should contribute any thing in the way of security against misdecision, in all such cases Jury trial in the 1st instance is purely bad: consequently, in all those cases, Jury trial in the 2nd instance, in so far as it imports exclusion of Jury trial in the 1st instance, is preferable.

But cases of this description exist, and in the whole to a very considerable extent: probably much beyond all the others put together.

In this predicament stand *undisputed* causes.

In the *Report* of the Committee of the House of Commons (Order for printing dated 2d of April 1792) on *Imprisonment for Debt*, (p. 27.) the number ofailable Writs, annually issued in Middlesex alone, is stated at 9,500. So many  
Writs



Writs issued, so many actions commenced. But the Writs included in this enumeration are such only in virtue of which the Defendant is or may be arrested and held to bail. The total number of Writs issued, including those in virtue of which the Defendant can not, as well as those in virtue of which he can, be arrested—in a word, the total annual number of civil actions of all sorts *commenced*,—must therefore have been much more considerable.

But in that same Report (p. 30.) the whole number of civil causes of all sorts annually *tried* in Middlesex, in the King's-Bench and Common Pleas together, is stated at 750: which, adding those tried in the Exchequer, would unquestionably not have amounted to so many as 1000.

Taking this for the proportion, here then are for every *disputed* cause, about 10 *undisputed*.

In the same page, the number of actions, annually terminated by Writ of Enquiry before the Under Sheriff of London, is stated at about 924. But in this number the London as well as the Middlesex causes are included: those commenced byailable Writs, as well as those commenced by Writs notailable; and the undisputed as well as the disputed ones: these must therefore be thrown out of the account.

II. In whatever cases, if in any, Jury-trial in the 2d instance, and not before, being not only *physically* but *prudentially practicable*, Jury-trial in the 1st instance is *physically impracticable*, in all such cases Jury-trial in the 2d instance and not before is better than Jury-trial in the 1st instance: meaning by *prudentially practicable*, practicable without additional and *preponderant* inconvenience, whether in the shape of increased *probability of misdecision* or of increased *delay, vexation, and expense*. But there are several of these sorts of cases; and, in the whole, to no inconsiderable extent.

III. So where, being in the 2d instance *prudentially practicable*, as before, in the 1st instance, though not *physically* it is *prudentially impracticable*. But there are also several of these cases: and here too, in the whole, to no inconsiderable extent.

IV. So where, being in both instances *prudentially practicable*, it is, in the 2d instance and not before, *practicable to more advantage*, than in the 1st instance, whether



whether in the way of saving of *delay, vexation, and expense*, or in the way of security against *misdecision*, or in both ways.

For the purpose of *conception*, cases where Jury-trial in the first instance is *physically* impracticable, and those in which it is *only prudentially* impracticable, may, as above, be considered *separately*:—But, for the purpose of *exemplification*, they can no otherwise be considered than *together*.

Why?—Because to exhibit the *forms* of Jury-trial will in every case be physically practicable, whatsoever becomes of justice.

In a civil case, not to speak of criminal cases, whatever cause is decided by a Jury, such cause, if tried under that condition which is regarded, and justly, as essential to Jury-trial—that is to whatever superior security, real or apparent, against misdecision, it may be capable of affording—must be tried in the compass of a *single sitting*: or, what comes to the same thing, if any adjournment take place, that adjournment must be performed in such a manner that the Jurors shall not, any of them, have any communication with the world at large: in a word, they must be in a state of seclusion, as in a Roman *conclave*. *In civili*, no instance of a Jury, sleeping before verdict, ever reached my knowledge. *In criminali*, in the case of Elizabeth Canning who in 1754 was convicted of perjury, the trial lasted *ten days*: during all which time, if in this respect the trial was properly conducted, the Jury must have been kept in a state of seclusion: though in the account of the trial (State Trials, vol. x.) I see nothing mentioned on that head.

The operations for which, in every instance, time either is, or eventually may be, necessary, are—1. Delivery of the *evidence*—whether testimonial, written, real—whatsoever the cause affords. 2. *Observations* preliminary and subsequential by or in behalf of the parties on both sides. 3. *Charge* of the *Judge*, including recapitulation of the evidence where necessary, and observations. 4. *Discussions* among the *Jurymen*, when withdrawn to their private chamber for that purpose.

But the cases (the individual cases,) in which the complete performance of those several operations is physically impossible, are very materially numerous—bear a very considerable proportion to the whole number of causes destined, in *appearance* at least, to this mode of decision,



as being commenced in a mode which admits not of any other.

Of these four operations just-mentioned, three are *comparatively* immaterial: viz. *observations* by or on behalf of the parties, *charge* by the Judge, and *discussions* among the Jurymen: and the two last, either or both, are not unfrequently omitted in practice.

But the delivery of the *evidence*—of whatsoever information, being presented in that character by either party, is neither *irrelevant* nor *superfluous*, is essential to the affording the requisite security against misdecision—is essential to justice.

Numerous are the causes, which receive their decision from *arbitrators*:—in some instances, *without* litigation in the regular mode: in other instances, *after* litigation in the regular mode: the cause, coming on in its turn to be tried by a Jury, is, in this case, instead of being so tried, *referred*, some how or other, to arbitration; if not otherwise disposed of.

When in this way, instead of being tried by a Jury, a cause is tried by arbitrators, the mass of evidence is not unfrequently of such a bulk, as to be incapable of being delivered in less time than several days, perhaps even weeks. As often as this state of things has taken place, the employment of Jury-trial in the first instance has thereby been proved to be *prudentially* impracticable.

*Physically* impracticable, however, if no regard be paid to the ends of justice, it can not in *any such* case, it can not in *any* case, be said to be. If, the mass of relevant and not superfluous evidence being of such a magnitude that the delivery of it can not be performed in less than ten *days*, no more than ten or twelve *hours* be allowed for the reception of it, but at the same time the forms of Jury-trial are observed, and a decision—a verdict—extracted from the Jury, in this case Jury-trial is not physically *impracticable*, for it is *practised*.

In this case, the best thing that can happen to a cause, is—that Jury-trial shall in that instance have been deemed and allowed to be impracticable. For then the attempt to try it in that mode is given up, and it is sent off to a *reference*, or otherwise disposed of.

If this be not its fate, a cause thus incapable of receiving a trial by Jury, in the first instance, in a manner consistent with the ends of justice, receives it notwithstanding. As often as this happens, the party who is in the right,



right, is divested of that superior chance of success, which, if the cause were tried properly, he would possess: his chance of 2, 3, 4, or whatever it be, to 1, is reduced to a chance of 1 to 1;—is an affair of cross and pile.

Remain to be spoken of the cases in which, though when absolutely considered, Jury-trial in the 1st instance can not be said to be, either in the *physical* or *prudential* sense, *impracticable*, it is yet *ineligible*: ineligible, to wit, in comparison of Jury-trial in the 2d instance and not before:—and that for special reasons, over and above the already mentioned general ones.

Causes thus circumstanced, there will presently be found reason for distributing into two classes: both of them however agreeing in this—viz. that, if (according to the standing supposition) commenced in the *natural* mode, (by conjunct appearance of the parties) they would be incapable of receiving, consistently with the ends of justice, their termination *on the same day* on which they thus receive their commencement. Whether or no the cause can or can not receive its termination, at a period thus pure from delay vexation and expense, can not be known till something in relation to it is known, viz. from the only authentic source—till the parties, being thus met together, have been heard: and as a considerable proportion of the whole number of causes may and do receive their termination at this early period, the measure taken for the attainment of the ends of justice would be imperfect, Jury-trial being employed in the first instance, if, at the very commencement of the cause, a Jury were not in waiting to receive it. But, as before observed, when once they have begun their business, a Jury, to remain a Jury, can not part till they have gone through with it. As often therefore, as it turns out, that, from the Jury, before whom the cause has thus been commenced, it can not receive its termination, this Jury must be discharged from it; and, if decided in the way of Jury-trial, it must receive its commencement and termination together, before some other Jury, at some other time.

Here then, besides so much of the *labour* of 12 men in the character of *Jurors* thrown away, there is so much time and labour thrown away on the part of *all other persons* who bear any part in the cause:—Judge, sub-judicial officers, parties, and, if they have any, their professional assistants, with the money expended in affording a retribution to those assistants.



Moreover, of a cause thus circumstanced, another Jury could not take cognizance, without further manufacture of useless *delay, vexation, and expense*. Whatever evidence had been submitted to the first Jury would have to be submitted over again to the second.

Meantime, for want of taking it at the earliest period, some of the *evidence* which, but for this second Jury-trial might have been had, may have been *lost*: and thereby deception and *misdecision* generated.

Moreover, of the first crop of evidence, more or less of the *freshness* and instructiveness may have been *lost*: time having intervened for *premeditation*, opportunity of receiving *undue instruction*, information from experience what falsehoods stand most exposed to detection or contradiction, what others may be hazarded with less risk. Then too comes, perhaps, an inconsistency, real or supposed, between the *first edition* of the evidence and the *second*: and discussions carried on, and time consumed, in the endeavour, successful or unsuccessful, to clear it up.

These, it is true, though not altogether without their concomitant advantages, are inconveniences inseparable from the sort of appeal called a *New Trial*, if conducted with that full liberty of confrontation and discussion, which is necessary to the taking the best chance for the discovery of truth. But, their being in that case unavoidable, is no reason for incurring them, where they may be avoided.

Many likewise are the instances, in which it would be impossible to fix a particular day for another Jury, unless it were at a venture, taking the greatest length of time that in any event can be necessary. Here then is an indefinite quantity of *delay* produced, that under a permanent Judge might be avoided: for, under a permanent Judge, each article of evidence naturally will be, as it ought to be, received on the earliest day on which without preponderant inconvenience it can be had.

I come now to speak of the two classes of cases above alluded to, both comprisable under the above description, but, in a highly material point of view, standing upon very different grounds.

One case, and the more common of the two, is when the mass of the evidence which the cause furnishes, having been delivered in part, viz. so much at least, if any, as had fallen within the cognizance of the parties or either of them, the remainder, though *known* to the parties by whom



it is respectively to be produced, is *not forthcoming* at the time.—My demand (says the plaintiff) will be proved by *Oculatus*: but he lives at a distance, and it requires the power of the Court to secure his attendance: or it will be proved by such or such a written document: but that is in the hand of *Custos*: and *Custos* would neither bring it nor trust it out of his hands.—Say then

*Case 1. Evidence, all known, but not all forthcoming*:—or rather, to contrast the better with the other case.—*Evidence, though not all forthcoming, all known.* Say now,

*Case 2. Evidence, the existence of it more or less of it unknown*: requiring to be brought to light; viz. by *investigatorial* procedure.

*Investigation* or *investigatorial procedure*, a new and necessary name, for a practice in common use, but not as yet sufficiently distinguished.

*Investigatorial power*, power for tracing out evidence, in the way of *investigatorial procedure*:—for the discovery of evidence ultimately employable, (evidence fit to be received into the *budget* of evidence, as parcel of the mass on which the decision may, with propriety, be grounded) by means of other evidence, whether itself ultimately employable or not. From his connection with one or other of the parties, or from any other relative situation, real or supposed, A. is supposed to be capable of furnishing relevant evidence.—When convened, A., of his own knowledge, knows not any thing about the matter: but, through him, the Judge hears of B., who does. So, in regard to *written* or *real* evidence, A. has not the document sought: but he indicates B., who is supposed to have it. B., being convened, if he has it, produces it: if not, he indicates C, who, if he has it, produces it: if not, he indicates D:—and so on through the alphabet.

In what precise shape the assistance rendered to justice by this power shall show itself—against which of two evils opposite to the ends of justice it shall afford a remedy—failure of justice or misdecision—depends in each case upon circumstances.

Suspecting, nay assured of the existence of the requisite mass of evidence; but, for want of this necessary instrument, feeling his inability to bring it to light, in many instances the plaintiff, despairing of success, forbears to pre-  
sent



sent his demand to a system of judicature, of whose inability to give effect to it he is thus pre-apprihed.—In these cases, *failure of justice* takes place: but nothing worse.

In other cases, assured of having right on his side, but not sufficiently attentive to the obtaining a timely assurance of the means of giving effect to it, he commences his suit, and afterwards, with an article of necessary evidence in his view, understands, when too late, his inability to produce it. In this case, the mischief takes the shape of *misdecision*: misdecision, to the prejudice of the *Plaintiff's* side, for the want of necessary evidence, existing but not producible. And here, to the suffering attached to the failure of justice, is added the *vexation* of disappointment, and the *expense* of the costs on both sides.

Thus stands the matter, where the mischief that takes place for want of this power, falls on the *Plaintiff's* side. But the *Defendant's* side, though not quite so much exposed to it as the *Plaintiff's*, is far from being exempt from it. When it falls on this side, it is in the more afflictive shape, that it falls:—*misdecision*, aggravated by burthen of *costs*.

Be the case criminal or civil, your Lordship sees how necessary an instrument this power is to the hand of Justice: how lame, how paralytic, that sacred hand can not but be, if deprived of it. A few pages further, and your Lordship shall see—if not *Justice, Judicature*—Technical Judicature—standing with her shrivelled hand, lame of that palsy. The *right* hand,—the hand by which justice should be distributed, may be seen, from a variety of other causes, subject to those fits: while the *left* hand—the hand which, by a pre-established *mechanism*, gathers in and closes upon the fees, as the *Dionæa* upon flies, is ever alert and vigorous.

When, at the outset of the cause, any part of the mass of evidence which it affords is unknown, the *tracing it out* thus from hand to hand, may, considering that the hands may be at any distance from each other, *occupy any length of time*: the evidence of witness A. being obtainable on one day, of witness B. not till another day, week, month, or even year, and so on without any certain limit: half a dozen witnesses not examinable but at so many different days: on each day it being uncertain whether the next day may not complete the mass of evidence. That on each  
day



day a Jury should be in waiting, for the purpose of taking the chance of being able to give termination to the cause on that day, is an arrangement, the impracticability of which will scarcely be thought to stand in need of proof.

To warrant the Judge in causing the mass of evidence to be laid before a Jury, whether summoned for that special purpose, or already in waiting for general purposes, there must be a sufficient assurance on his part, that all the evidence which, in his judgment the cause is capable of furnishing, or such part of it as is necessary and sufficient to ground a decision on either side is already forthcoming, or will be so time enough for their taking cognizance of it.

On this occasion, let it not be forgotten, that, till an article of evidence has actually been *received*, there can never be any perfect assurance of its being *forthcoming*: to whatever class the evidence belongs, testimonial, written, or real, accident or design—misconception or right conception—may, when the time comes, have kept it at a distance:—and to all these contingencies, the *Jury's* capacity of fulfilling the purpose for which they are brought together remains for ever subject.

But, in the case of the permanent *Judge*, if the *whole* mass of the evidence has thus been really *got in*—got in *by himself*—he perfectly *acquainted* with it—having received it in its *original* and  *freshest* shape—the *grounds*, of the decision which the case calls for, being thus completely *known to him*—the case in effect already *tried by him*—to what use *try it over again*, if, of all the persons concerned, there is not one who desires to have it so?

To parties, to witnesses, to Juries, to Judge, to every body, double trouble: useless and factitious *delay*, *vexation*, and *expense*: and, (fee-fed lawyers always excepted, to whom every body's suffering brings advantage,) not a particle of advantage, in any shape, to any body.

In every case, no sooner is the cause become ripe for decision, than my *single Judge*, my *Sheriff Depute*, unincumbered with a Jury, *circumduces the proof* (as a Scotch lawyer might say), *closes the budget*, as I would say, and pronounces—not an interlocutor—but final judgment. Now from this decision, pronounced without an atom of time or money wasted, what possible prejudice can result to justice?—The party to whose disadvantage it operates, is he satisfied with the decision? Nothing better could be wished for, had the cause been dragged through a thousand Jury-boxes. Is he dissatisfied? He has a Jury: he has it,



it, in that case, and in that case alone, in which he desires to have it:—in which it will be—not an aggravation, but a remedy.

Supposing Jury-trial, or the *forms* of it, forced upon the parties in every case in the first instance, the bad effects of this force, are not confined to the *loading the cause* with this cumbrous additament where it is worse than *useless*; your Lordship has seen it *depriving the cause* of the benefit of this security against misdecision, in cases in which it would be *of real use*:—how frequently these cases come to be exemplified in practice, is a point which I shall have occasion to speak to presently.

At present what I have to submit to your Lordship, is—that when *grafted on natural procedure*, as above, the utility and efficacy of the proposed *postponement* is not more signal, in narrowing the application of this mode of judicature where it is useless and prejudicial, than in *extending the application* of it, wherever it is of real use. For, though there are cases, and to a very considerable extent, in which, *in the first instance* the use of it is *impracticable*, and even generally recognized as being so, there is no case in which it is not *practicable* in every sense, when *postponed* as above to the *2d instance*.

For this purpose it rests with the Judge, (in the first instance the same Judge, eventually in case of appeal for that purpose the superior Judge) to *decompose* the mass of evidence. If (as will genenerally be the case) the whole of it (that is, so much as one or other of the parties insists on having *repeated*) be not too much to be laid before one and the same Jury, so much the better: but if, in the whole, there happens to be more than a Jury can receive on such terms as to do justice to it, receive in the compass of *one sitting*, the cause being in such sort and degree *complex* as to contain at the same time, (as when of such bulk, it can scarce fail to do) divers *integrant parts*, independent of each other, it may in such case be distinguished and resolved into its integrant parts and different integrant parts, or assemblages of integrant parts, given to so many *different Juries*.

By *integrant part*, I understand so much of the mass as is delivered by witnesses, whose *testimonies* respectively *have a connexion with each other*: the testimony of each witness operating either in *confirmation* or *infirmation* of that of the rest.

The *mode* and *degree* of complexity just described will frequently



frequently be exemplified, where the case includes a number of facts (whether *individual* or *habitual*) having, in respect of probability or improbability, no connexion with each other: 1. Debt, founded on goods sold and delivered at *different times*: 2. *Demand* on one part, *set-off* on the other: 3. Promise, *made* at one time, *broken* at another.—Thus in adultery;—1. *Marriage* celebrated at one time: 2. Alleged *adultery* (of course) at another: 3. *Wife's loose intercourse* with other men, habit provable by one set of witnesses: 4. *Husband's loose intercourse* with other women, habit provable by another set of witnesses: 5. Husband's *cruelty* towards the wife, habit provable again, perhaps, by another set.

But, of the time occupied by each such integrant portion of the mass of evidence, measure, complete measure, has been already taken;—taken by every body concerned—by Judge and parties. It is therefore a point pre-ascertained, and to as great a degree of accuracy as is material, what length of time the delivery of the whole and each part of the mass, will occupy, when repeated before a Jury.

Separating it into masses of competent length, as many as the extent of it requires, he distributes it to so many Juries, giving to each Jury one or any greater number of *issues*. One, to try the entrance into the marriage contract for example, if it be matter of dispute; as in Scotland where the contract may be made as it were by habit: another, to try the fact of the adultery, and so on.

But, after the evidence has been once gone through—gone through in all its *integrant parts*—it will seldom indeed happen, that the disagreement in opinion—I mean that between the losing party and the Judge—will extend over *all* the parts. So many as the disagreement does *not* extend to, so many the evidence to which need not be repeated. By the party by whom the decision is complained of, of the number of facts, and corresponding integrant parts of the evidence on which it was grounded, a greater or less part will, commonly, if not before, at least after the delivery of the evidence, be admitted. Thus in adultery, suppose the fact of the marriage *once* put out of doubt, by the uncontradicted and unquestioned testimony, of the clergyman or other person by whom it was celebrated, or by evidence of cohabitation under the same name and the same roof for years;—to what use, after witnesses *once* heard and the matter put of doubt, drag them from their homes, to put it out of doubt a *second* time?



If then, in such a case, for the purpose of vexation, a party should insist upon such repetition of proof in the second instance, of a fact put out of doubt in the first instance, let him do so, but at his peril: the Judge *à quo* marking it as vexatious, it will rest with the Judge *ad quem*, with or without the concurrence of the Jury, to mark it out for punishment: to punishment in the shape, and to the extent of *costs*, at any rate.

Instead of being distributed among *divers Juries*, to be decided upon, all at the *same time*, the integrant and distinct parts of the mass of fact may be given to different Juries, or even to the *same Jury*, to be decided upon at *different times*:—to the same Jury not so well, on account of the danger or suspicion of *embracery*, and so forth.

In one case, the trying these different parts of the cause at different times will be attended with particular advantage. This is where, pronounced in one of the two opposite ways, a decision given on one of the several component parts of the cause thus decomposed, renders the trial of the rest, some or all of them, superfluous. Thus, no contract, no breach: no marriage, no adultery.

Such are the advantages which Jury-trial, *in the second instance*, possesses over Jury-trial *in the first instance*, even when grafted on the best possible mode, upon the best and soundest stock—I mean *natural* procedure.

I will now beg your Lordship's notice for the advantages of Jury-trial in the 2nd instance, as compared with Jury-trial in the first instance, grafted, as under the husbandry of learned gentlemen, upon the corrupt and cankered stock of *technical* procedure—stock and graft together, the tree of good and evil, not to say of evil without good—factitious delay, vexation and expense, the fruit of it.

The conception entertained by Scotchmen, of Common Law procedure in civil cases, with Jury-trial in the English mode, will be very incomplete, if, to excess of *delay*, they do not add excess of *precipitation*: for, in the composition of it, vices of this opposite nature, meet and embrace in the most perfect harmony. With the help of *vacations* (that is pre-established *denial of justice* for weeks and months together) and *fixt days*, and *mechanical judicature*, (of which in my first letter) instead of a small part of *one day* or a small part of each of *two days*, (for where the ends of justice are the objects—I speak of the *Courts of Conscience*—a great majority of the whole number of causes actually take no more), *six months* or *twelve months*, or a great



great many more months—in a cause as simple as any that ever came before a Court of Conscience—consumed in doing nothing or worse than nothing:—delay, the staple commodity of Judge and Co., manufactured in this wholesale way, for the accommodation of their best customers, the *malá fide* suitors. Then come *Circuits*, one or two in a year, according to the *latitude*: from part of one day, to the whole of three or four days, allowed to a place, whatever be the number of causes to be tried in it, and whatever the quantity of time required by each:—a short and *limited* length of *time*, and that frequently short in the extreme, for an *unlimited* quantity of *business*.

Alas! where, my Lord, is the wonder?—That for which sufficient time can not in any case be wanting, is—*receipt of fees*: that for which it matters not how short the time, is the *service* to be performed in consideration of those fees.

Has *delay* its profits?—*precipitation* is not less productive. But your Lordship will see:—

Of the whole number of causes set down for trial in a year, one part (who can ever say how large a part?) tried badly: another part, as yet unknown, but not incapable of being known (it rests with your Lordship to know it), and, in the mean time, known not to be a small one, not tried at all. When this is the result, there are three modifications, among which it takes its chance, all of them repugnant to justice.

I. One is, the going off in the character of a *remanet* or *remanent*: i. e. to be tried at the *next Sittings* or *Assizes*. Consequence of the postponement as follows:—

1. *Delay*. Cause (suppose) pecuniary, (Plaintiff in the right, as in general he is—) *loss of interest* on the principal representing the value of the property adjudged by the verdict: amount of interest, if it the *Sittings*, say 3 months; if at the *Assizes*, elsewhere than in one of the four *Northern Counties*, 6 months: if in any of those Counties, 12 months. For this is among the punishments a man is loaded with, for the *offence* of living in the *country*, and the doubly heinous offence of living in the *northern* parts of it.

2. *Expense*. Expense of trial somewhat less than doubled, on the second—(*trial*, it can not be called, the cause not having been tried when it should have been tried, but—) *set-*



*ting down* of the cause upon the list of causes that ought to be tried—some abatement perhaps in the professional fees: in the official, scarcely.

3. *Danger of misdecision, or equivalent failure of justice*, in consequence of the delay: deperition of necessary evidence, deperition of the *matter of wealth*, in the hands of the adverse party, in the character of eventual *matter of satisfaction*:—deperition viz. with reference to the party in the right—by dissipation, by concealment, or by exportation.

II. Another mode of termination is by what is called a *compromise*: which, being interpreted, is *denial of justice*.

By the terrors of *remanency*, as above explained, the plaintiff *consents* to accept a part of what is his due, giving up the rest.—By *consent*, the *traveller* gives up to the *unlicensed plunderer* what money he has about him, in order to save his life. By *consent*, the *plaintiff* gives up to the *malá fide* defendant, armed with delay, put into his hands by his learned partners, value to any amount, viz. to whatever can be agreed upon, with extortion on the one part and distress on the other, to settle the account.

III. The third and last remaining mode of termination is by *reference*. Reference is either to one *referee*, agreed upon on both sides, or to two or more referees, called *arbitrators*, named, one or more, seldom more than one, on each side.

Referees may be either lawyers, or non-lawyers: lawyers, very frequently:—whether most frequently or not, is more than I can take upon me to pronounce: it is among the thousand things in and about law, worth knowing and not knowable.

In this case, this is what a man gains by having recourse to technical procedure; to that which by courtesy passes among lawyers, by the name of *justice*:—the advantage of finding himself, at the end of the suit, in the same situation as he was at the commencement of it, always excepting what concerns the delay, vexation, and expense:—licence to obtain justice, if he can, at the hands of non-lawyers, or lawyers—after paying for it and not getting it, at the hands of lawyers.

Does your Lordship feel any such curiosity, as that of knowing the number, absolute and relative, of these causes in which justice is paid for and not done? In your Lordship



ship *will* is *volition*, clothed and armed with *power*—in me, it is bare *inert velleity*:—meantime accept at my hands what Chance presents to them.

Times (Newspaper) 16th Dec. 1806. “Yesterday morning in the Court of King’s Bench, Guildhall, eight causes for *Special Juries* appeared on the list for Trial. They were *all* referred: in one only, a verdict was taken, *pro forma*, for the Plaintiff.”

The whole number without exception—in all of them justice *paid for*—in all of them justice *denied*! This, where time for trying them, for pretending to try some one of them at least, could not be wanting. Sent off untried?—For what reason? To all appearance, because, in the instance of each such cause, there was something in its *complexity*, and thence in its *length* or *intricacy*, that rendered it incapable of being so tried, even by select men, men of cultivated minds, to any good purpose.—The causes, *London* causes, and those *Special Jury* causes; therefore *mercantile* causes of the *higher* order:—causes naturally attended with a large measure of complication.

Here, no want of time: the causes therefore capable of being tried one or more of them that same day, howsoever badly. How then must it be at the Assizes?—where, to any degree of complication, and thence of *prudential* impracticability, is so frequently added absolute *physical* impracticability, through denial of necessary time.

In another case—the date of which I must beg to stand excused from mentioning—while the pleadings are opening, Counsel for defendant proposes a reference, which, the Plaintiff, being present, at length assents to. A referee, really above all exception, and *pro hac vice* a non-lawyer, is agreed upon. The noble and learned Judge, having perused the pleadings, certifies them to be very intricate, highly approves of the reference, and declares that it *does credit to the Counsel on both sides*.

The virtue of *candour*—your Lordship sees (for, if this be not the proper name of the virtue thus displayed, I must confess my inability to find for it any other)—the virtue of *candour* (for this is the virtue I have heard named a hundred times on similar occasions)—in short, whatever the virtue displayed on this occasion was, was displayed by learned gentlemen: and, lest virtue should fail of its reward, the praise of this virtue, whatever it was, was with accustomed *liberality*, (virtue for virtue) bestowed upon them by the noble and learned Lord.

My Lord, though of my own knowledge I know nothing



thing respecting the correctness of this account, I should find no sort of difficulty in crediting it. In the state of things in question, it is natural that learned gentlemen should display such virtue: it is natural that learned Lords should bestow such praise on it: not unfrequently has it happened to myself, to hear like virtue rewarded with like praise. Without any loss of fees, the whole body of learning, Lord and Gentlemen together, gains so much *ease*: the whole body of learning goes so much the sooner to its dinner. Ever and anon, learned gentlemen, one or more of them, acquire the faculty of displaying other virtues in the character of *referees*: the virtue of *justice*, in the award when made: the virtue of *patience* (for fees *de die in diem* are no slight pledge of patience) by the care taken not to be precipitate in making it. The whole body of learned gentlemen acquire ulterior chances for ulterior displays of virtue: by motions for *setting aside* the award when made: by motions for *attachment* for non-performance of it:—two species of *motion-causes*, setting out from opposite sides, but meeting at the same point.

Here then we see a species of judicature, of which, the distinguishing characteristic, is the being altogether inapplicable in *effect*, in a large proportion of the instances in which it is applied in *demonstration* and *pretence*: a feature of deformity altogether without parallel in the worst mode of judicature that can be found in the same country or any other. And this is the species of judicature, which, in a plan of reform, it is proposed to introduce, and without any change, into a country as yet unvexed by it.

Day by day, this mode of judicature is seen to stand in point blank repugnancy to the ends of justice: practicable, only in demonstration and grimace: impracticable, prudentially, and even physically, in effect. In every such instance the real effect of the institution is to serve the partnership, and particularly in the higher branches, in the character of a false pretence for receiving money—receiving without earning it.

But the oftener the repugnancy is brought to view by experience, the oftener this pillage is repeated, the more abundant are the occasions on which this meed of praise is earned on one part, bestowed on the other. The murmurs of suitors are drowned in a *concert of praises*: a concert, in which lawyers, all *amateurs*, are sole *performers*: a concert performed *by them*, for their own *benefit*, and at the *expense* of justice.

I speak not here of the cases, numerous and extensive  
as



as they are, in which the Jurors are mere *puppets*, their minds no more applied than that of the Emperor of Morocco, to the decision given in their name:—*Special Verdict* found *for them* by learned gentlemen, Jurors contributing nothing but a stare:—verdict taken *for them* on this or that one of half a dozen or a dozen *counts*; said counts all lawyers lies but one:—one of the twelve taken in vision out of the Jury-box, that the absence of the Plaintiff, who stands before them, may be recorded by order of the Judge.—(Alas! I was confounding—though in perfect innocence—lie with lie;—*withdrawing a Juror*, to make a drawn battle; and *calling the Plaintiff*, that, by saying *I am not here*, he may, under the loss of that cause, console himself with the prospect of losing another.) These, with instances in plenty that might be added—more apposite, more impressive, if they were worth looking for—would, if detailed, make it necessary for me to attempt to drag your Lordship's conception, along with my own, through the filth of *fiction*:—and sufficient to the day is the evil thereof.

To those whose love for the system rests on the imposture mixt with it, all this appears right and proper: the appearance of a Jury, and the people deluded by it, which is all that is wanted. But *my* Jurors, my Lord, are not *puppets*. I wish not to trouble them often; but when they *do* come, they come for use, and not for show.

All that mockery would vanish of course, were the cognizance given to the Jury reserved, as proposed, for the *second* instance.

On this occasion, a word or two more may perhaps be not ill bestowed on the practice and power of *investigation*.—In Natural Procedure, there being no bars to shut it out, it takes place, (Your Lordship has seen how) of course.

Without any special authority (for there needs none) every Justice of the Peace exercises it, whether sitting out of General Sessions, and thence free from technical trammels, on matter submitted *definitively* to his cognizance, or carrying on, under the statute, a *preparatory* examination in a case of felony. Under the like liberty, every *Committee*, and every *Commission* of Enquiry, pursues, for the discovery of truth, the same necessary course:—pursues it, through any number of intervening links or channels; regardless, (nothing calling for regard) of the difference between this less direct, and the more direct or immediate mode, of obtaining *ultimately-employable* evidence.

The



The case is—that it requires art and contrivance—science and regularity—to bereave the hand of Justice, of an instrument at once so natural and so necessary.

Such ingenuity is not wanting to *English-bred* technicalism. The effect is produced, by confining the efficient part of the course of procedure within the compass of one single sitting.—A., who knows nothing, indicates B., who knows every thing. But before B. can be so much as sent for, the Jury-box is emptied.

As little is it wanting to *Rome-bred* technicalism. A., who knows nothing, indicates B., who knows every thing. No want here of *time*: Sittings in any number: Judge's pay (for an Examiner or Examining Commissioner is a Judge)—Judge's pay *per diem*; other learned persons' pay *per number of words*; words and Sittings consequently not scarce.—A., who knows nothing, indicates B., who knows every thing. But the scene lies in the Judge's whispering-closet: from which all who have any interest in the discovery of the truth are carefully excluded. The persons to be examined are predetermined: and, by the solemnity of an oath, the seal of secrecy is applied to the lips of the Judge.—A., who knows nothing, indicates B., who knows every thing. But B., who knows every thing, is unknown to the persons without whom he can not be had.

Such being the imbecility of the *trunk*, (I speak of *Rome-bred* procedure) such is it in *four* at least of its *branches*:—*Continental* law in general;—English *Equity* law:—English (coinciding in this point with *Continental*) *Spiritual* law:—English (coinciding with *Continental*) *Admiralty* law.

If every where the hand of Justice labours under this palsy, it is because everywhere she has found such regular-bred practitioners to tie up the nerves.

An occurrence, that happened not many years ago—one of a thousand that are happening every year—may help to place in broader light the two *companion pictures*—of *real* Justice, in her native vigour, and *sham* Justice, in her *straight waistcoat*.—A man dropped out of his pocket bank-notes to the amount of about 500*l*. They were found by another man, who, being poor and illiterate, was unconscious of the value of his prize. The value opening to him by degrees, he fell into negotiations with Jews and Gentiles, and disposed of it, or a part of it, at an under value. It was a case for *trover*: out of the multitude of instances in which the action so denominated is brought,



one of the very few in which it can be brought without a lie. No one to make oath of felony, or cause of suspicion of felony. No felony, therefore no legal ground for examination by a Justice of the Peace. But among *unlearned* Judges in general, and among those of the London Police in particular, strange as it may seem to *learned* ones, there does exist a sort of a principle or whim, whatever be the proper name for it, called *the love of Justice*. It is by this principle, or this whim, that they are led, on such a variety of occasions, to "do good by stealth,"—your Lordship will see how: and as they never find it "fame," that being a monopoly in the hands of their learned betters, whatever is done by them in that way, is without any expense to any body in the article of "blushes." In the particular instance in question, at the Queen Square Police Office, *Mr. Colquhoun*, hearing of the loss, took the business in hand: and, laying about him, with his so well known activity, in this irregular way—hitting the mark by pushing in *quart*, where *Learning* would have missed it by pushing in *tierce*—got back for the loser his 500*l.* except a small part that had been spent. From link to link, he followed up the chain of information, as if it had been by an examination, carried on under the Statute in a case of felony. *Warrant* none, there being no legal ground for any such coercive instrument: no witness convened but by a *summons*; to which, had the impotence of the technical system, to this, as well as so many other good purposes, been known, no regard would have been paid. Fortunately for justice—poverty, or simplicity, or terror, withheld the confederates, one and all, from applying to an Attorney. If Justice be a friend to man, the omission was fortunate: since it is to that she owes that technical judicature, or its terrors, did not tie up her hands.

All the learning in Westminster Hall, armed by all its power, would not have got for the man a single farthing of this 500*l.* The finder, with the money in his pocket, would have moved off, or spent it, or shifted it from hand to hand. To the loser, *the best thing* that could have happened, would have been, to be apprised *in the first instance* of the impossibility of recovering the money, and so to have sitten down quietly with the loss. *Another result* would have been, the commencing the action, and for want of that power of *investigation* which in a civil case *technical* procedure does not give, *suffering a nonsuit*, or *judgment as in case of a nonsuit*, with three or four or five score pound to pay, for costs on both sides. Another and



still worse misfortune, would have been the *getting a verdict*, and thereupon, by a sort of a vehicle, called a *Writ of Error*, find himself set down, and then hung up in a place called the *Exchequer Chamber*, where he would have had a *year* to cool his heels, while the finder was spending or securing the remainder of the 500*l.*:—deducting, *inter alia*, for merit crowned with learning and nobility, a slight retribution, of which *Lord Ellenborough* can give your Lordship a much more particular account, than it is in my power to do at my humble distance. But of this in another Letter, in which your Lordship may take a nearer view of the difference between the *love of justice* and the *love of fees*.

As to Scotch Judicature, though another twig of the old stock, I should hope to find that, somehow or other, she has escaped this palsy; or, at the worst, that it has its intermissions. No Jury: therefore no necessary compression of a trial, into a space of time incapable of holding it. At Edinburgh, the *Lord Ordinary*—that is, not he, but a *Clerk*, or a *Clerk's Assistant*—(*Lawrie*, p. 110.) takes the evidence; and, if he proceeds in the manner of the *Lord Ordinary on Oaths and Witnesses*, he admits “parties and their advocates,” to be present: (*ib.* 105.) and in the country “before Commissioners, the depositions are taken (*ib.* 107.) in the same manner as before the *Lord Ordinary*.” Though learned Lords know better than to allow, to any such one of their deputed to whom they intrust this vital part of judicature, the faculty of pronouncing any decision, on the evidence that no body but himself has heard, or will hear—his door (I see) is not always shut against parties, or at least not against parties’ lawyers; and, seeing no limit to the number of his sittings, the conclusion I draw, is—that when A., who knows nothing, indicates B., who knows something, it may happen to B., in that event, to be heard.

*Diligence*, *Scotico-jargonicé*, means, *inter alia*, an order to a man to appear in the character of a witness: for among Scotch, as well as English, lawyers, it is a rule, that, when a word in use among the people is employed, it may be employed to mean any thing but what the people mean by it. *Diligences* are the nets employed in Scotland to fish for witnesses; and, seeing nothing to hinder but that, from the beginning to the end of the career of *factitious delay*, *diligence* may follow upon *diligence*, I see nothing to hinder, but that when it happens to an ignorant witness to have pointed out a knowing one, the knowing one may be heard.

But,



But, under the management of your Lordship's learned Reformer, English, is to be the model of Scotch, justice:—Juries, for ever! and in the true English style! And thence comes my apprehension, that, either for want of thought, or from thought twisting itself to the sinister side, this palsy may be inoculated into Scotch justice, along with so many others from the same source.

Thus stands the matter, in respect of the provision made for the discovery of sources of evidence as yet *unknown*. If, in this deficiency in the system, the situation of the authors considered, there appear not much cause for wonder, there will appear still less, when it is observed how, by another of its vices, sources of evidence *already known* are exposed to perish without remedy. During the six or twelve months, or any greater number of months of the factitious and unabridgeable delay, Fortune is not always idle. A necessary witness whose testimony would, under the natural system, have been collected the first day—this necessary witness (suppose) dies: thereupon, along with him, perishes the plaintiff's or the defendant's right:—for in all that time, the system has afforded no possible means of preserving his evidence.

For the relief of this disorder, under English law so carefully inoculated and nursed by one sort of lawyer—the Common Law Judge—up come, another sort of lawyer—the Equity Judge—with his sham remedy: Bill in Equity for examination *in perpetuam rei memoriam*, or examination *de bene esse*.

In both these instances a previous suit in Equity is necessary:—with its attendant train of *extra delay, vexation, and expense*.

In both instances the evidence is *collected* in the *bad mode*—put into the *bad shape*—attached to that modification of technical procedure:—with its attendant danger of *misdecision*.

In the case of the examination *in perpetuam rei memoriam*, the suit has no other object:—and, admitting of no decision, ends when that object has been obtained, or found unattainable.

In the case of *examination de bene esse*, a suit having an ulterior object being already instituted, the effect of the application for an examination in this *mode*, or rather upon these *terms*, is only to procure the examination of this or that witness to be *accelerated*;—performed before the Defendant's *answer* has come in, though not before he has *appeared* (*i. e.* without appearing, has submitted to employ



an attorney in his defence);—performed at that *premature period*, antecedently to the stage appointed by the general rule for the examination of *all* the witnesses.

In both cases, there is a chance,—but, on this occasion, it were far too much to undertake to explain what chance—that the evidence so collected under the authority of a Court of Equity, may come to be employed in a trial at Common Law, and laid before a Jury.

But in neither case can it be so employed, unless the witness so examined be, by death, or perhaps by incurable infirmity, disabled from attendance. Moreover in both cases, besides that this remedy, even when admitted to be applied, is thus inadequate, and no less apt to afford aggravation than relief, so scanty is it in its application to the field of law, as to cover but a small fragment of the extent of the demand.

No such remedy, where the *person* of the plaintiff, or of any one else, through whose person *his* mind is wounded—none where his *reputation* is the subject of the injury.

No such remedy, where, the subject of the injury being this or that individual article of specific moveable property, the injury consists in *destruction* or *deterioration*, the result of negligence or malice.

No such remedy, in a word, beyond the comparatively scanty range of *Equity* jurisdiction; of the imperfection of which in point of extent this sample may serve: for, as to the marking out its limits, a mystery, which remains such to the most learned eyes, will not be undertaken to be revealed, especially in a parenthesis, by this unlearned hand.

But, even within this narrow range, it may be a question, whether, upon the whole, justice, so far as Jury-trial is concerned, is any thing the better for it.

Excepting (for special reasons, too special to be here detailed), the case of a *will*, the validity of which it is meant to secure against dispute—without some apparent danger of death, as likely to ensue before the witness can be presented to a Jury-box, a man will not be apt, even where Equity and Common Law join in allowing it, to betake himself to so expensive a security. Were such precaution natural, the use of it would be general, in all cases in which the importance of the cause presented a warrant for the expense. The case of a *will* (as above) excepted, the use of this security is in a manner confined to the case, where imminent danger is certified by old age or particular infirmity.

The



The suitor then (say the plaintiff) having notice of the indisposition of the witness, if so it be that he has law and reflection enough to be aware of the peril that awaits him, repairs accordingly to his Attorney. The scene lying most probably in the country, (the country containing 7 or 8 times as many inhabitants as the metropolis) while he is occupied in procuring an *interview* with the *Attorney*, or the Attorney in *corresponding* on the subject with his *Agent* in Town, and the one or the other in *drawing instructions* for the Bill in Equity, and Counsel in town or country in *perusing and settling* the *Bill* or *drawing the interrogatories*, or the Agent in town in performing the operations preparatory to the taking out the *Commission* for the examination of the witness, or while the Commission or the Commissioners are upon their *travels*—the patient dies, or loses his recollection, or does not choose to be disturbed, on the subject of a dispute which to him is a matter of indifference:—not to mention, that men are apt to die at short notice, that a disorder which proves mortal is not always at the outset known to be so, and that it does not necessarily follow, that because it happens to me to stand in need of a man's testimony, his manner of life, and the state of his health lie all along within my knowledge.

Of this incidental *Equity suit*, thus to be squeezed into the belly of a *lawsuit*, the certain expense is, in the greater number of instances, greater than the whole value in demand in the lawsuit: greater not only in the majority of the suits that *would be* instituted under the *natural* system, but in the majority of the suits that *are* instituted under the *technical* system, notwithstanding the exclusion put by it upon so great a majority of suits and suitors.

Of this incidental suit the *costs*, on one or both sides, are borne by the party whose misfortune it is to stand in need of testimony thus circumstanced: and this not only in the first instance, and while as yet it is unknown whether his demand be just or no, but even after the definitive judgment given, and the justice of his demand established by it.

If the patient recovers, in such manner that his testimony is capable of being delivered at the trial, so much the worse for the party who stands in need of it: for in that case the testimony must be collected on this second occasion in the only mode in which it ought to have been collected on any occasion, and the expense of collecting it, including travelling expenses, *demurrage*, and so forth, is repeated.

All these considerations laid together, it would be matter



ter of satisfaction rather than regret, should it be found, as I am confident it would, that, in comparison of the number of instances in which it might be employed, the instances in which this insidious remedy is actually employed, are extremely rare.

In Queen Anne's reign, on the occasion of the Act which afterwards passed for the amendment of the Law (4 and 5 Ann. ch. 16.) this defect in Jury-trial, as then and still constituted—a defect—not in the *composition* of the tribunal, but in the course of procedure anterior to the day on which the cause is brought before that tribunal—came under the view of Parliament, and was attested by the recognition of both Houses. Under the guidance of Lord Somers, the Lords proposed a palliative, at once inadequate and dangerous: under the guidance of Mr. Pulteney, the Commons rejected, and prevailed upon the Lords to join in rejecting, this palliative, but for reasons, a material part of which operates in condemnation of the still subsisting practice.

The proposal of the Lords (Journals, xviii. 69.) was, that  
 “ *after Issue joined*, in any Action to be brought in the  
 “ Courts of Westminster, upon oath made, that any witnesses *cannot* be present at the trial, by reason of their  
 “ *being to go* beyond the seas, or by reason of sickness, or  
 “ other infirmity; it shall be lawful by rule of Court, for  
 “ the Plaintiff or Defendant, to exhibit interrogatories to  
 “ such Witnesses to be examined thereunto, upon oath,  
 “ before one of the Judges of the said Court, or before  
 “ Commissioners to be appointed under the seal of the  
 “ Court; which depositions may be made use of at the  
 “ Trial, in case the Witnesses *can not* be there; and the  
 “ said Depositions shall be afterwards entered or enrolled in  
 “ the said Court.”

The mischief having its root in the essence of the technical system, no remedy, leaving the basis of that system untouched, (refusal to hear parties and witnesses at the outset,) could operate as any thing better than a feeble palliative:—but this remedy fell short even of that feeble palliative. A case to which it applied itself, besides the somewhat less exceptionable ground of “sickness or other infirmity,” was the case of a design, on the part of the witness, *to go abroad*: a case to which it did not extend was that of *death*. To save himself from the ordeal of cross examination, a man, engaged by corruption *ab extra* or *ab intra* to give false testimony, may feign (and what more easy than to feign, and in a manner not to be detected?) “sickness or other infirmity?” or, what is much more simple, if it be worth  
 his



his while, he may pretend obligation to go abroad, take a trip from Dover to Calais, and so go abroad on purpose: but to no such purpose will a man either die or feign himself dead. Examination taken in either of the modes thus proposed by Lord Somers, might therefore, if under condition of not being used but in case of *death*, have, comparatively speaking, been legalized with little danger: and in this case the earlier taken, the more effectual the remedy. But the stage of the cause, proposed for taking the examination, was—not till *after issue joined*; that is, not till after two, three, or any greater number of months after the commencement of the cause.

Of the body of objections, which operated to the conviction of their Lordships (Comm. Journals, xv. 198.) an indisputable part was composed of such as have no force but upon the supposition of the radical impropriety of Equity practice: of an essential part of the practice of the Court, of which the noble and learned Lord their spokesman, the great Lord Somers, was sole Judge: the impropriety (I mean) of employing one Judge to hear and see witnesses, another, and without the first, to apply their testimony or supposed testimony, to its use:—an impropriety most explicitly confessed by the Lord Chief Baron Gilbert in the book called Bacon's Abridgment, title Evidence, vol. ii. p. 625: and which, I have not the least particle of doubt, would with equal frankness, be confessed, or rather proclaimed, by Lord Somers's noble and learned successor, should it occur to your Lordship to put the question to him across the convivial table.

Meantime, supposing the admission, thus proposed to be given to the testimony in this make-shift shape, had been confined to the case on which, in the most perfect shape, testimony from the source in question is not to be had—on this supposition, the proposed amendment (it is evident) would have been a real improvement: I mean, in so far as it consisted in allowing the application to be made in the Common Law Court, in which the suit was already lodged. The use of it might in that case, and of course would have been, co-extensive, *in civil matters at least*, with the jurisdiction of the Court, in which the evidence was to be employed: and, except the radical inconvenience of committing the decision, to a Judge, by whom the witness, at the time of his examination, was neither seen nor heard—an inconvenience which, however, can not always be avoided—the mode of collection would have had, or might have had, in every other particular, the advantages which Jury-trial possesses in common with the *natural* mode:



mode:—viz. *cross examination* by or on behalf of the adverse party, with the benefit of *questions arising out of the answers*, and so forth.

But, in this proposed *amelioration* of the *technical* system, whatsoever good there was or could have been, what is it but an *approximation*, and that a remote one, made towards the *natural* mode?

On all such occasions, what care, what tender care on all sides, to avoid seeing the object—the unexceptionable, the perfect system—all the while standing close under their eyes!

In respect of the *occasion* and the *purpose*, correspondent to the English practice of examinations *in perpetuam rei memoriam*, and *de bene esse*, is the Scotch practice of examination of witnesses to lie *in retentis*. But, whereas the jurisdiction of English Equity extends over but a part, probably the smaller part, of the field of what in one of the four or five senses of the word *civil* is called *civil law*, the applicability of the Scotch practice of taking depositions *in retentis* is co-extensive (I take it for granted) with the jurisdiction of the Court of Session; an authority which, in one way or other, covers the field of civil law in its whole expanse:—not to mention a considerable portion of the field of *criminal law*.

Scotland not being afflicted by any such distinction as that between *Law* and *Equity*—to the application of this remedy, such as it is, no additional suit, in another Court is in Scotland necessary: but even *there*, whether, upon the whole, justice finds most matter of satisfaction or of regret in the facility of resorting to it, is matter of *account*, the statement of which is beyond my competence.

In some other place, I propose to myself to submit to your Lordship some sort of *apperçu* of the *price* paid—paid by the people—paid in the several shapes of *delay*, *expense*, and *denial of justice*, not to speak of *misdecision*—for the benefit of Jury-trial, at its present *stage*, grafted as at present on the *technical* system;—and for the services rendered by learned Lords and Gentlemen—to some body doubtless, but to whom I can not find, except to learned Lords and Gentlemen—by the upholding of that, together with the other branches:—as likewise what are *not*, as well as what *are*, the considerations, by which this popular branch of the *technical* mode of procedure has never ceased to command their eulogy, any more than the *natural* mode their silence. But, fearing to diverge too far from the more immediate subject of this letter, I dismiss these topics for the present.

Having



Having thus submitted to your Lordship the only plan, upon which, in my view of the matter, Jury-trial in civil cases can in Scotland be rendered, in any considerable degree, subservient, upon the whole, to the ends of justice, I proceed to consider so much of the proposed plan on this subject, as appears on the face of the *Resolutions*.

From the very little that is there stated, what I see distinctly enough is, in what way this supposed remedy against factitious delay vexation and expense, if that be among the objects of it, presents a probability of giving *increase* to that aggregate mass of inconvenience: what I am unable to discover, is—by what means it presents a probability of making any *defalcation* from that mass.

No particulars being given, concerning the mode in which the several questions of fact are designed to be brought before the Jury, to speak of this and that and t'other mode in the character of possible ones, and then to say—this will not diminish delay &c., nor this, nor that—is a sort of exercise that would be little better than fighting shadows.

What I see beyond doubt, is—that, to lay the points in question before a Jury, abundance of new formalities must be introduced: what I do not see any probability of, is—that, upon the introduction of this new mass of formality, any such portion of the existing mass, as shall be equal to it, will be cleared away.

In England, a cause in which a Jury is employed, is sooner terminated (it has been said,) than, without a Jury, a cause of the same nature would be in Scotland. Be it so:—but it does not follow, that by the application of Jury-trial, even in the best mode in which, under the existing system of technical procedure, it could be applied in Scotland to that same cause, the cause would receive its termination there sooner than it does now. In the midst of so much factitious delay, what little abbreviation there is in the English mode, depends upon the *system of pleading* taken in a mass: and I have no more apprehension of seeing the Scotch nation submit to defile itself with any such abomination, than I have of seeing the port of Leith opened, for the importation of a pack of mad dogs, or for a cargo of cotton impregnated *secundum artem* with the plague.

In English pleading, what little abbreviation—defalcation (I mean) from factitious delay—what little abbreviation of that sort there is—and that purchased at the expense of intelligibility and cognoscibility, speaking with reference to



the body of the people—consists in the use of those general propositions or forms of averment, on the part of the defendant, called *General Issues*:—*not guilty*;—*non assumpsit*, and four or five more; some of which include others, so logically have they been framed. But these propositions have not, any of them, any meaning, but in the way of reference: and their meaning varies *ad infinitum*, according to the object to which they are referred:—it varies, according to the *genus* of the action, as characterized by the *declaration*, (the instrument of *demand* exhibited on the part of the plaintiff) and the *counts*, the *specific* demands and allegations contained in it. *Not guilty*, for example, the most changeable of all these *Proteuses*, involves two clusters of propositions, which are altogether different, according as the action it applies to is an action of *trover* or *ejectment*. In one of the instances it entitles the defendant to prove, by way of defence, one or more of *one* list of facts, in the other, one or more of *another* list of facts, and so on: lists tolerably well settled, (viz: among lawyers) for ordinary purposes, by arbitrary, and absurd, and inconsistent decision, but altogether undiscoverable by the light of common sense, and thence incapable of being understood, even by the enlightened part, of the body of the people.

The *two general issues* here mentioned, corresponding to *three formularies*, or *genera of actions* (*non-assumpsit* corresponding to the action of *assumpsit*) are mentioned, because under one or other of these actions, but in by far the largest proportion under *assumpsit*, nine tenths at least of the whole number of causes, commenced in the regular way in the Common-Law Courts, would be found to be comprised.

But it is to the use of these *abbreviations*, one advantage of which (professionally speaking) is, that they are so frequently found to stand in need of *re-dilatations*, under the name of *papers of particulars*, (with fees for the same,) that every thing that savours of *dispatch* is confined in English practice: and this jargon, unless, as in British India, planted by the bayonet, being incapable of taking root in any other than English ground, along with it vanishes all the advantage, looked for, or pretended to be looked for, on *that* score.

But this prop, in the character of a *technical support* for the Jury-box, being thus found eaten up by the dry-rot, there remains no other regular Common Law support,  
than



than that, the rottenness of which is conveyed to every ear by the name of *Special Pleading*: a mass of corruption, on which a stigma is regularly imprinted—I will not undertake to say exactly how many times—some dozen of times at least—every year, by the hand of the legislature:—as often I mean, as allowance is given, to plead the *general issue*, and give the Act in evidence.

Remain, (it may be thought,) for *supports* to the Jury-box, the *papers of particulars* above alluded to, or whatever else, under the name of “*relevant facts* alledged in the summons or other writ” &c. or “admissions or denials thereof,” may be proposed to be substituted to them on Scottish ground. But these, so far at least as they extend on English ground—the only ground on which they have ever been placed—are but fragments of a *new* system of *Special Pleading*, already dry rotted, serving no other purpose so assuredly and so completely, as that of a certificate, bearing witness to the rottenness of the old.

Call them (these conflicting masses of allegation)—call them by any name—English or Scottish—*counts* and *special pleas*—or *counts* on one side, with papers of *particulars* on either or both sides—“*summons*” (with the *libel* in it) on one side, “*whole defences*,” distinct or indistinct, on the other—the same religious care is observable, on both sides of the Tweed, to prevent their cutting the thread of the suit too soon—to prevent their answering any other purposes, to the prejudice of the *ends of judicature*:—the same effectual care, to shut out that simultaneous, reciprocal, complete, and correct explanation, which nothing but the presence of both parties, facing each other under the eye of the Judge, can give—to prevent the stemming of that torrent of learned and indefatigable *mendacity*, which spreads such fertility over the antient demesnes, attached to *Inns of Court* and *Colleges of Justice*.

Another *support* indeed, capable of being provided, is a *suit in equity*: as where, in the language of English equity, an *issue* is said to be *directed*. Upon the hearing of the cause, on the ground of the mass of evidence, already delivered in another shape, the comparative untrustworthiness of which is thus recognised, an allegation or set of allegations are fixed on, and, by the help of a *lie*, dictated by the Judge, the *truth* of it is sent to be inquired after, on the ground of testimony, delivered in that more trustworthy shape, in which alone (except now and then in a  
case



case of necessity) it is ever suffered to be presented to the Jury-box.

To the adoption of this basis, no objection on the score of probable repugnance, seems opposable. Unfortunately, by the same causes, and in the same proportion, as the *practicability* of it is increased, the *utility* is diminished. The cause is first to be tried in some one or other of those bad modes, to which, in consideration of their acknowledged badness, Jury-trial is proposed to be substituted: under the name and notion of a substitute, Jury-trial would, on this plan, be erected as a superstructure, on an edifice, the immoderate bulk of which is the very subject of complaint.

At the end of a course of *special* pleading, in the *original* mode, the points in question are somehow or other brought to an issue, without the application of any such instrument as *human reason*, on the part of the Judge. In the new-invented mode, by papers of *particulars*, the use of that instrument, in that learned hand, is, or at any rate might (I should suppose) be, alike spared. But, in the case where an *issue* is *directed*, nothing that is to be done being predetermined by any pre-established forms, whatsoever *might* by possibility be done, in practice nothing ever is done, without a previous settlement of the *tenor*, the very words, of the issue, under the eye of a Judge. This function—being, like so many other of the most essential functions of judicature, beneath the dignity of so great a personage as the *Judge* so called—is turned *over*, that is turned *down*, to a subordinate sort of Judge, called a *Master*:—more delay, more business, and more fees.

This practice of directing issues, were it imported into the port of Leith, the same incompatibility with superior judicial dignity would—though not necessarily, but too naturally—be imported along with it.

Meantime, this operation of *directing an issue* or *issues* is not materially different from that which *my* Judge would have to perform, in the case where Jury-trial were called for by either party, after a decision pronounced in the character of a definitive decision, by himself. And, unless the instances, in which, under the existing practice, reference is thus made to a Jury, are much fewer than they ought to be, (which, under the recognised enormity of the addition to the expense, may not improbably be the case) your Lordship may conceive by anticipation, how few the instances



instances would be, in which, on my plan, the *good men and true* of Scotland would find themselves saddled with this burthen, in comparison of the instances in which they would have to submit to this vexation, on any plan which the learned Reformer could approve.

One actual, and therefore possible, though even rarely exemplified, technical substratum for Jury-trial, (I am sensible) still remains; and that is the sort of cause, to which, finding no name *in use* for it, though in every technical Court they are heard every day in swarms, I have been obliged to *make* a name, and call it a *motion-cause*; a cause carried on upon no other than the favourite sort of evidence already mentioned—*affidavit* evidence. *Petitions* to the Chancellor in matters of *Bankruptcy*, form the most striking—and probably, in respect of average quantity of value at stake, the most important—exemplification:—*petition*, a sort of *motion*, upon paper. In the case of these *petition causes*, an issue is now and then directed; and, even in other *motion-causes*, in other Courts, reference has been known to be thus made to a Jury, though much more rarely.

But, to the working after this model, there are two objections: one on the ground of justice and utility, the other on the ground of practical probability of adoption.

On the ground of *justice and utility*, the objection is—that, under *this* mode of trial, the encouragement to *perjury* is so great, that the facts, capable of being extracted out of the mass of testimony for the purpose of being taken for the subject of the issue, will be liable to be concealed or overwhelmed, by the mass of false facts advanced, under the protection, afforded by that mode of trial, against the scrutinizing power of *counter-interrogation*: not to speak of its *dilatoriness* in comparison of the *natural* mode, and its furnishing no witnesses but *willing* ones. It presupposes therefore the universal extension of a mode of conflicting testification, alike favourable to the generation of perjury, and unfavourable to the *direct ends* of *justice*.

I throw out this objection, rather as matter for consideration, if it were worth while, than as being assured of its not being upon the whole an advantageous succedaneum to the existing system.—But what renders it not worth insisting on, is its failure on the ground of *practical probability*. A *motion-cause*, though, in comparison of a cause carried on under the *natural* system, enormously *long*, is, in comparison of a cause carried on under any other branch  
of



of the *technical* system, as conspicuously *short*. It moreover imports a withdrawing of the *mendacity-licence*, and a substitution of a meagre and comparatively close discourse, *purporting* at least to be the discourse of the party himself, to the exuberant and inexhaustible effusions of professional and learned eloquence.

In the case of an *incidental* application, springing out of a cause already introduced and carried on in regular form, such abbreviation may be admitted. But, to apply to the *body* of every cause any such short method, would be an infringement of the prerogative of the *College*, a contempt for the wisdom of ages, and a violation of the *Act of Union*, if not *totidem syllabis* at any rate *totidem literis*. Indeed, be the occasion what it may, and the arrangement proposed what it may, to be assured of its being a violation of the *Act of Union*, there needs no more than the assurance of its being a defalcation from the mass of *delay, vexation, and expense*, and thereby from the reward, allowed by the wisdom of ages to learned industry.

Accordingly, it is merely in the character of a *model* already existing in the English *repository*, that I mention this possible *support* for Jury-trial in Scotland—and that no article, in the list of these models, may be omitted—and not with any the smallest expectation, any more than wish, of seeing it recommended to your Lordship's notice by your Lordship's learned Reformer, or any other learned adviser, for any species of cause;—meaning always *principal* not *incidental* causes.

By what means therefore this additional formality is likely to be made to operate in the character of an instrument of *dispatch*, passes my comprehension: but how it may be, and is likely to be, made use of as an engine of *delay*, to that question answers offer themselves in abundance.

Occasion has already presented itself—not surely of informing, but however of humbly reminding your Lordship, that there are such sorts of causes as *malâ fide* causes. Of the existence of such iniquity, the innocence of the learned Reformer, if his language were to be believed, has need to be informed. In the 10th Resolution he speaks of *dissatisfaction*—of a party's being “dissatisfied with the judgment of any Court,” meaning subordinate Court:—and proceeds, as if a real dissatisfaction with the judgment of such subordinate Court were the only motive, which, in his experience, any man ever found, for making application to a super-ordinate Court.

Sup-



Supposing Scotland to be this sort of Utopia—from the power which he gives to either party, for referring the matter with or without reason to a Jury, no very considerable mass of mischief might arise. But in England, as your Lordship may have seen, and will see a little more distinctly a little further on, we have a *Chamber*, in which the vermin that spin out such causes are bred in swarms, as lice and fleas are said to have been bred in Turkish hospitals, and nurseries, founded and stocked for the purpose: and one of his improvements, as your Lordship will see presently, consists in the building of just such another receptacle at Edinburgh, spick and span new.

Admitting then the existence of the breed of *malá fide* suitors, without which his nursery for them would be without inhabitants, your *malá fide* defendant for example, with another man's estate or money in his hands—admitting the existence of this best sort of customer, observe my Lord, (but I think your Lordship will not be *pleased* to observe) in how many shapes nourishment is provided for him, by these four *Resolutions* about Juries.

He forms his calculation; and, if mesne profits, or interest of money promise to outweigh the eventual addition of expense—or without any such trouble of calculation, if his affairs be desperate—after all anterior sources of delay are exhausted, taking care to wait till the last moment, he flies to *Resolution* the 6th, as to the horns of the altar, and calls for his share in this new-imported stock of English liberty.

If, as per *Resolution* 7th, “that part of the country “where the evidence can be most easily obtained” happens fortunately to lie within the range of a Circuit, and the commencement of that *race against time* happens to be, or can be made to be, at a convenient degree of remoteness, the further off the point of time, so much the better for *mala fides*.

Moreover, the principle of *circumgyrating* justice, consisting in the allotment of a limited quantity of time for an unlimited quantity of business, another chance thus gets into the bargain, is—that of finding, that when the cause has got to the Circuit Town, there is no time for trying it as it should be; whereby he gets the benefit of cross and pile:—or there is no time for trying it at all; whereby he gets either the benefit of a further respite to the *next Circuit*, or that of finding his adversary content to give up half his right, rather than see the other half exposed to further perils.

Is it a cause that has taken its commencement in *Shetland* or the *Orkneys*? a cause about a hovel, for example,  
of



or a few yards square of potatoe-ground, adjoining to it, or the boundary between one such scrap of ground and another?—he lays hold on *Resolution* the 8th, and up goes the cause to Edinburgh, and there breeds another cause, the object of which is to know, whether the Court of Session there shall or shall not think fit, that when the cause is got back again so far in its way to Norway, it shall receive the benefit of its share in the new imported stock of English liberty.

And note, that the power, of thus giving exercise to the faculty of *loco-motion*, may be no less useful in the hands of a *malá fide* suitor on the Plaintiff's, than on the Defendant's side.

As for example—in a situation like Lord Selkirk's, should it happen to a man to be actuated by a disposition, such as nobody can be further than I am from meaning to attribute to that noble Lord, it might not be unworthy of your Lordship's consideration, how much might be done in such hands towards ridding the country of its superfluous population, by actions judiciously introduced into the local subordinate Court, and thereupon set to vibrate, as above, in an arc of 200 or 300 miles length, between the subordinate Court and the super-ordinate.

Over and over again, I have had, or shall have, occasion to confess, that were there any such instrument as a *speculum mentis* that would suit the purpose, *astutia* rather than innocence, is the state in which I should expect to find the learned Reformer's mind: should this conception on the other hand be erroneous, it may be of real use to him—in his office or in his profession—to be informed, what wicked people there are, in this wicked world.

The mention made in *Resolution* the 6th and *Resolution* the 9th, of the Lord Ordinary's Court (in the Outer House) and the Court or Chamber, (meaning, I presume, the correspondent Inner House) reminds me on this occasion, as on so many others (of which hereafter) of the enigmatical and mysterious state of that Court, which is at the same time *two* and *one*. Our *malá fide* suitor, when, with the help of one Jury or succession of Juries, he has exhausted the stock of delay purchaseable at the Outer House, is it proposed that, with the help of another Jury or like succession of Juries, he shall be admitted to the purchase of a fresh stock in the Inner House? and this in the two cases —of the causes, breaking out of his Lordship's hands and getting into the Inner House, (*viz.* by *reclaiming petition*,) whether he will or no, and that of its being gently wafted  
thither



thither by his diffidence ; viz. in that easy sort of vehicle, called a *great avisandum*, in the construction of which his Lordship shows a degree of expertness so far above the comprehension of any English Judge ? These are questions, to which, from the first, an answer *may* have been provided, though, upon the face of the *Resolutions*, no trace of any such thing should be to be found.

As to *Resolution the 9th*,—relative to causes brought on in an *inferior* Court, including the Country Courts at all distances,—whether it be considered in itself, or confronted with *Resolutions the 6th and 7th*, relative to causes brought before the Court of Session in the first instance, it calls, in my view, for questions and observations more than one.

When, under *Resolution the 8th*, proofs having been allowed in a Court in the *Orkneys*, application is made from the *Orkneys* to *Edinburgh*, for trial by Jury, *where* is it supposed that the trial will take place?—in the *Orkneys*, from whence the cause came, and where most probably the residences of witnesses and parties are—or at *Edinburgh*?

In the case where the cause is brought before the Court of Session at *Edinburgh* in the first instance—in that case, by *Resolution the 7th*, the idea occurs (I perceive) to the learned Reformer, that there may be one part of the Country, in which “evidence may be more easily obtained” than in another, and power is accordingly given to the Court of Session, to place the scene of action in that view. But, to the case where the cause is in the first instance brought before the Country Court in the *Orkneys*, this power is not extended. Had *Resolutions the 7th and 8th* changed places, this doubt would have been removed: but, whatsoever may have been the cause, the monopoly of this benefit seems to have been intended for the suits commenced at *Edinburgh*: suitors, perverse enough to wish to have justice administered to them near to their own homes, not being thought worthy of it.

True it is, that for aught I know, the intention may have been, that when a cause, which from the *Orkneys* has *ascended* to *Edinburgh*, has *re-descended* to the *Orkneys*, receives the benefit of Jury-trial, it shall not be at any *Circuit* Court, but at the *stationary* Court from which it came: I mention this therefore, not as matter of opinion on my part, but as matter of doubt.

Be this as it may, if I comprehend the matter right, my Lord, suitors who wish to receive justice, without being sent 200 or 300 miles for it, are a bad set of people: their wish is to cheat superior merit, the exclusive growth of the



metropolis, out of the reward so richly due to it:—the practice of bringing causes before these paltry little Courts is accordingly a bad practice, and ought to be discouraged. Else why is it that, when a cause is brought in the first instance before one of those petty Courts, neither party can have the benefit of Jury-trial, without trying the cause first at Edinburgh, to know whether it shall be tried afterwards in the Jury mode, in the Edinburgh Court, there or elsewhere?—to be tried, viz. in the Court it came from, or in the Circuit Court, or in God knows, and perhaps the learned Reformer knows, what other Court: while, if the Plaintiff has but the sense to commence the cause in the proper place, in the only place in Scotland where any sort of cause ought to be commenced, to wit, at Edinburgh, where persons of superior learning and merit may extract their due out of it, he as well as the Defendant, may put themselves in possession of this new and matchless benefit, each of them at his own will and pleasure, without being beholden for it to the Court of Session, or any body else, and without being obliged to join in the trial of a preliminary and additional cause, as above.

In England, centuries ago, these little country reptiles were either swallowed up, or sucked dry—nothing left but a husk—by the great serpents in Westminster Hall:—the wisdom which gave success to the design, was, if I mistake it not, a prototype, and perhaps a model, to this the learned Reformer's grand scheme of Reformation.

All this while, lest injustice be done to Jury-trial, and a matchless remedy put upon the list of pure poisons, let it not, my Lord, be forgotten, that in Jury-trial all this crabbedness is not innate, but comes of its being grafted upon a cankered stock, instead of a sound one: upon the *technical*, and in particular, upon the Scotch branch of the technical, instead of the *natural* system of procedure.

And moreover, in respect to *removal* in general—removal for whatever purpose and under whatever pretence—if it be so well adapted as at present it appears to be, to the convenience of the *malá fide* suitor, it would not be so in the smallest degree, under that modification of the *natural* system, which I propose to submit to your Lordship, in the *Facienda*. If it is so now, it is only because (as I proceed to state in my next letter) learned Lords and Gentlemen find it convenient to have it so: finding, in the *malá fide* suitor, for whatsoever stock of *delay*, *vexation*, and *expense*, they can contrive to manufacture—in the *malá fide* suitor, (the *latent* though not *dormant* partner in their  
1  
firm),



firm), besides a partner, their best sort of instrument, and in the mode and conditions of *removal*, one of their best channels of conveyance.

On this occasion I know not whether there be any adequate use in hinting, that, of the two modifications, of which misdecision, on the part of a Jury, is alike susceptible—viz. misdecision which calls for *reversal*, and misdecision which, respecting quantity only, calls only for *modification*—viz.: *augmentation* or *diminution*—(say, misdecision *pro toto*, and misdecision *pro tanto*)—the eye of the learned Reformer seems to have pitched but upon one.—A verdict requiring correction—for example, on the score of *excessive damages*—and given without any direction from the Judge, or against his direction—was it considered, and meant to be included under the description of a verdict given contrary “to evidence?”

But the occurrences—specified as above, in the character of fit grounds for *new trial*—are they *all* that required to be thus specified?

1. *Vicious composition* of the *Jury*—by the admission of a Juror who had gained admission by *fraud* after his disqualification had been pronounced—

2. *Mistake* or *misconduct* on the part of the *Jury*—in giving a verdict contrary to *evidence*—or contrary to the *direction* of the Judge respecting matter of law—or in giving a *general* verdict, the Judge requiring a *special* verdict, or a verdict subject to the opinion of the *Court*—or in deciding by *lot*—

3. Notorious *partiality* of a *Juror*,—evidenced, for example, by previous declarations on his part, of a determination to cause the verdict to be given in favour of one of the parties—

4. *Mistake* or *misconduct* on the part of the *Judge*,—in *excluding evidence* that ought to have been admitted—or in *admitting evidence* that ought to have been excluded—or in giving an erroneous *direction* respecting the matter of *law*—

5. On the part of the *evidence*, a deficiency on one side—whether produced by *fraud* on the opposite side—by pure *accident*—by *misconception*, or *neglect* on the first side; viz. on the part of the professional agents of the party on that same side—

6. *Absence* of any other of the *dramatis personæ* whose presence was regarded as necessary—as for example, of an Advocate on one side—the absence produced by *fraud* on the opposite side—

All these have, in English practice, been sustained as grounds for the allowance of a *New Trial*.

These,



These, in the course of about a century and a half, (the time during which the practice of granting New Trials has been in use) have been brought to light, by the fortuitous concourse of the parent atoms of litigation: more, for aught I know, there may be, though I should not expect to find many, presenting an equally good title, but as yet lying unextruded in the womb of time. Were it to present any prospect of being of use, I know of *one* hand at least, by which, weak as it is, the labour of exploration would not be grudged. On this as on so many other occasions, Analogy, if properly commissioned, would, in the course of a few days or hours, produce in useful abundance, cases calling for regulation, and regulations adapted to those cases.

But it is among the maxims of learned policy, that all such *anticipations* are an injury to the profession, and as such ought to be discountenanced:—that the only fit shape for law to appear in, is that of *ex post facto* law:—that providence is rashness:—that punishment, especially when without delinquency, is better than prevention:—that legislation is usurpation upon jurisprudence:—and that to shut the stable door, before one steed at least has been stolen, is defrauding thieves and lawyers of their due.

From this cause it is among others, that cases—which to so vast an extent might, by the light of Analogy, be at *once* brought out and provided for—and, by the hand of the *legislator*, in the best mode—are left to be dragged out, one by one, time after time, each time at the expense of many a pang, by the afflicted *suitor*, and provided for, *in the course of ages*, by the hand of the *Judge*—proceeding in his ever imperfect and insufficient mode.

But to return to the *grounds* for *New Trial*. Of the above, upon which English practice has already put its seal, few, if any, would, I am inclined to think, be regarded by a Scotch lawyer, as insufficient.

Yet, out of the whole number, two and no more,—*contrariety to evidence*, and *misdirection of the Judge*—are specified by your Lordship's learned Adviser, in the *Resolutions*.

I have the honour to be, with all respect,

My Lord,

Your Lordship's most obedient Servant,

JEREMY BENTHAM.



## LETTER V.

*On the Bill called LORD ELDON'S.*

MY LORD,

I RESUME the pen. Times have changed; but the address of these Letters shall not change. Your Lordship's was the mark first stamp'd upon the measure. There I hope still to see it; by me, at any rate, it shall not—by your Lordship, I hope, it will not—be obliterated. Be the *fundator perficiens* who he may, to the character of *fundator incipiens* your Lordship's title is beyond dispute. Be the profit of the piece to the public what it may, your Lordship may claim to the last an author's share.

Your Lordship's edition of it was the subject of the four preceding Letters. When the last of them was concluded, the plan of observation I had set out upon, wanted much of having been completed. My intention, however, was to have gone through with it, and that intention wanted at length but little of having been executed. But when the text was fully understood to have been laid upon the shelf, the comment could do no less than follow it. Should the text ever find its way again to the carpet, it will then be time enough for the comment to follow it in its course.

Not that the labour bestowed upon the dormant plan is altogether lost. It can be no secret to your Lordship that, to my humble view of the matter, the tower of Judicature was already high enough, and, to all but the favoured few, to whom a golden ticket opens the way, the summit of it sufficiently inaccessible, without any such additional stage as your Lordship's learned architect had planned for it. My intended globe of compression shares, of course, the fate of the fortress against which it was designed to serve. But if, of the stock of projectiles originally destined for that service, it should happen to a splinter or two to glance that way, without prejudice to the new service to which they are now destined, so much the better for economy, and not the worse, I hope, for justice. To us in England, intermediate Chambers of Review are no novelty. Viewing them at once in the character of shops where injustice, in the shape of delay, is sold to all who will pay the price, and in the character of Mexican temples, polluted by human sacrifices, this feeble hand would regard itself as employed, not like that of Erostratus, but like that of Daniel, if, in addition to the model of the



projected Scotch edifice of that name, it were able to consign those antique receptacles of corruption to a consuming fire.

Though always a respectful observer, your Lordship never has found, never can find, in me, a flattering one. Had I a vote, and at the same time no other option than between the plan prepared by your Lordship's learned Adviser, and the new one now placed upon the carpet by another learned scribe, howsoever it fared with my wishes, my judgment would find itself obliged to decide—that, in that perpetual competition for public favour, on which under the best, and, at the same time, the most improvable of all Governments, all hope of ulterior improvement depends, the latest bidder has, in the present instance, shewn himself the best. Do not let the lot be knocked down to him, my Lord. That, if not on the present, on some future contingent occasion, brought on by some new turn of the wheel of Fortune, your Lordship, after being enabled, may be prevailed upon to bid above him, is amongst the objects aimed at by this renewed address.

In the former instance, after a leading step or two, the direction pursued appeared to my weak judgment, such as it was, a wrong one. In regard to this new plan, what I have now to notice resolves itself into this, viz. that after a few uncertain and tottering steps, though the direction be in the main a right one, yet so small is the advance, yards or inches, when furlongs were necessary, that when the moving power is exhausted, the measure will find itself, by a vast interval, short of the proper mark.

The ease and comfort it gave me, not merely to find myself *at liberty*, but by the nature of the case, *compelled* to ascribe the details and technical parts of the plan to an inferior, and that an unknown, hand, was, on the former occasion, represented in my first Letter.

Happily, on the present occasion, the same good fortune still attends me. To outward appearance, and in common parlance, the Bill which lies before me presents the image and superscription of the noble and learned Lord whose seat (to use a flower culled from his own bouquet, of which presently) is “at the head of the” law—the second person in dignity after Royal blood—the Lord High Chancellor of Great Britain. As to the actual penmanship, I ascribe it without hesitation, to some other, and consequently, inferior hand. The proof is no less simple than conclusive. *Legislation* is, in every public station, (unless that of the Chancellor of the Exchequer be an exception) matter, either



either of mere *supererogation*, and not in any degree, or point of view, of *obligation*, or, at the utmost, of what according to the distinction so familiar to moralists and jurists, is denominated *imperfect obligation*. *Judicature*, i. e. on the part of a Judge, (to borrow a term from the same authoritative vocabulary) “*despatch of business*,” and with the utmost degree of *celerity* which, consistently with *rectitude*, the powers of *decision* on the part of the Judge admit of, matter of *perfect obligation*. How far in the highest source of that purest kind of law, which, in the only country that has any conception of it, is distinguished by the name of *Equity*, the rate of dispatch is from keeping pace with the demand, is a point that could no otherwise be ascertained in proper mode and form, than from the *register books*, and such other documents as, in either House of Parliament, any Member who should think it worth knowing whether *Equity* gets on or stands still, might command at any time. But that, in a general view, it is such as to present, to the eye of superficial observation at least, symptoms of debility in the extreme, and this whether the standard of comparison be taken from anterior, or cotemporary and collateral examples, is a fact, which, since the time of the Chancellorship of Lord Loughborough, has, with little interruption, been rendered but too notorious by the daily lists of causes, as well as by the groans of suitors, and the unvaried cloud that has been seen sitting upon the brows of Advocates, whom famine has driven, along with the causes, (*corpora cum causis*) out of the two great *banqueting halls* in *Palace Yard* and *Lincoln's Inn*, into the great audience hall at the *Rolls*. Of this inadequacy of the *supply* to the *demand* for *Judicature*, what the *efficient causes* may be, is a subject of too much delicacy, not to speak of danger, for so weak a hand as mine to attempt to dive into.—Whether it be that in mere spite, the powers which should have been the powers of *harmony*, have metamorphosed themselves into powers of *discord*, and notwithstanding, and even by virtue of, that very discord, entered into a conspiracy to disturb the quiet of the Bench, and in the rage of their hunger and thirst after *Equity*, to keep squalling and knocking for it at a door, which they deserve not to see open to them:—Whether....But it would be no less superfluous than perilous to attempt prying into *causes*, when the *effects* which, for the purpose of the argument, are so indisputably sufficient, are themselves beyond dispute.

My Lord, what, like an innocent and suspected *Queen*, I have been thus long groping for blindfold, in a labyrinth composed



posed of red-hot plough-shares—what I have thus been groping for, and am at length arrived at, is—this argument. The time of the noble and learned person, whose seat is sometimes upon a *bench*, sometimes upon a *woolsack*, is insufficient for the discharge of the duties of *perfect* obligation by which he is pressed :—*à fortiori* for *imperfect* ones. Clearing the paper of the causes is, so far as time and powers serve, matter of perfect obligation ; drawing this Bill, or any other Bill, is matter either of no obligation at all, or, at the utmost, but of an imperfect one. In the noble and learned bosom here in question, *conscience* is at once too delicate and too enlightened, to sacrifice *perfect* obligations to *imperfect* ones. Therefore it was *not* by the hand of the noble and learned Lord that this Bill was drawn. Therefore again it *was* drawn by some other, and consequently by some inferior hand : which hand, saving its inferiority, is unknown, which is all that I *do* know, or, so long as it is in my power not to know, *will* know, concerning it.

Hence, my Lord, my comfort: and now, with a tranquillized mind, I enter upon my new task.

Your Lordship will be apt to smile—other readers, if I happen to have any, will stand aghast—at seeing a *Letter* divided into *Chapters*, and those *Chapters* perhaps into *Sections*. But having no share in that profit which has *unintelligibility* for its source, nor interest consequently in manufacturing a chaos, without “distinguishable feature, shape, or limb,” such as the laws of *this one* country (this proposed law among the rest) are doomed to be,—more particularly in their *first concoction*, when, (for the purpose of reference, confrontation of parts, methodization and discussion) *division* and *distinction* are most necessary—having no such profit, I say, nor consequently any such sinister interest, even the *law of custom*—to so many noble and learned persons, and on such *good* and *valuable* considerations, the dearest and most sacred of all laws—has not been able to prevail upon me to forego the use of those instruments of distinct conception, as well as unambiguous and uncircumlocutory reference, which have the rules of *division* and *numeration* for their source.

## CHAPTER I.

### ANALYSIS OF THE BILL CALLED LORD ELDON'S BILL.

#### § 2. *Distinguishable Parts.*

For the purpose of such observations as I may have to submit, I shall take the liberty of considering the matter of the Bill as divided into four parts. Part



Part the *First*, taking for its *subject* the judicial establishment of the Court of Session, and the course of procedure in that Court, and for its declared *object*, "dispatch of business," occupies itself in making regulations outright, by the sole wisdom, as well as by the authority of Parliament.

Of the nineteen sections that may be found on numbering the paragraphs in the Bill (for, as already intimated, it would have been *unparliamentary* to have put them into a state already fitted for numerical reference, i. e. into a state in which they would have been capable of being referred to, otherwise than by a constantly tedious and oftentimes ambiguous circumlocutory designation) this part embraces, or at least touches upon, viz. § 1, 2, 3, 7, 8, 9, 10, 11, 12, 13.

Part the *second*, taking in hand the same *subjects*, and (it may be presumed) looking to the same *object*, not to speak of other objects, occupies itself in giving to the Court of Session, powers of *subordinate* legislation to be exercised on the *subjects* mentioned above.—Sections touched upon four, viz. 5, 6, 9, and 11.

Part the *third* occupies itself in giving to a set of special Commissioners *authority* (but without *power*) to make *enquiries* relative to the course of procedure in that Court and the *Sheriff's* Court, as carried on at present, and thereupon to propose any such alterations as, in their judgment, may seem proper to be made by Parliament; as also to *another* special Commission, the operations of which are confined to the particular purpose of reporting concerning the utility, and proper extent of *jury trial*, and the most advantageous mode of engrafting it upon whatsoever system of procedure may have been proposed by the set of Commissioners *first* mentioned.—Sections, two, viz. 18 and 19.

Part the *fourth* takes for its *subject* the Appeal presented from the Court of Session to the House of Lords; and for its *object*, (to judge by inference, in default of express declaration)—for its principal, at least, if not sole *object*—the reducing the "burthen" imposed by those applications "on the time of the House of Lords." Such is, at any rate, the principal declared object of the plan contained in the *Memorial*, presented to the House of Lords by eleven out of the fifteen Judges of the Court of Session, headed by the Lord President: which Memorial was followed by a Bill, and that by a second, having for its reputed author the same Right Honourable Judge: which Bills, taken together, form, upon the face of them, the basis of *this*, which since that time we have seen issuing from



from a still higher source.—Sections, four, viz. 16, 14, 15, and 13.

I proceed to sketch out the contents, or at any rate the *topics* of the Bill, considered as divided into these four parts.

§ 2. Part I. PARLIAMENTARY Regulations touching the Judicial Establishment.

1. Section 1. The Court of Session to be cast into *two* divisions: in division the first, the *Lord President* and *seven* other Judges; in division the second, the *Lord Justice Clerk* and *six* other Judges.

2. Section 2. The King to “*appoint*” which of the Judges shall sit in the several divisions. (The appointment *first* made, quære, is it to be susceptible of *variation*?)

3. Section 2. The Lord President of the whole Court to preside in division the first; the Lord Justice Clerk in division the second: in the absence of such permanent President, an occasional *President* to be elected on each occasion by “the Judges then present;” (if by “to *sit at the head* of such divisions respectively,” be meant to *exercise the functions of President*.) [N.B. In no one of the three four-seated Courts in Westminster Hall, does the Judge who *presides* sit *at the head* of the *line* of Judges.]

4. Section 3. Each division to contain the same number of “Judges of the Court of Justiciary,” reckoning for one the Lord Justice Clerk—(who always is one.)

5. Section 7, undertaking to give a *quorum* number to each division (the same to each) leaves a blank for it. (In the case of the entire Court, as often as a *quorum* number is mentioned, the blank is filled up.)

6. Section 8. Except in cases herein excepted, (see contents of Part II.) each division is to have “the like duties, powers, and functions...authorities and privileges” as are now exercised or enjoyed by the whole Court.

7. Section 8. This section takes for its object, the securing a *decision* in the case of *difference of opinion* among the Judges, with equal numbers on each side. But of this part of the Bill, I find myself unable to give any tolerably correct account, in any other words than its own.

8. Section 9. Liberty to the Plaintiff to choose under which division he will commence his suit.

9. Section 9. Cases of *remitter* excepted, (See Part II.) no removal of a suit from division to division. (Words in abundance, clouds proportionable.)

10. Section 10. Powers for enabling each division to obtain assistance from the opinions of the other.

11. Section



11. Section 11. "*Forms of proceeding and process.*" to be the same in the two divisions: no alteration but by the whole Court.

12. Section 12. Causes, depending at the commencement of this Act, how to be distributed between the two Divisions.

13. Section 17. On the appointment of a new Judge, "the forms of admissions are to be gone through" in that Division only to which he "is appointed." "If the admission be objected to, the objections are to be judged of by the whole Court."

§ 3. Part II. *Powers to Session, for subordinate legislation.* (a)

14. Section 5. Powers to the whole Court, for determining in what *numbers* in each Division the Judges shall officiate in the Outer House and Bill Chamber, separately or together.

15. Section 5. So, "in what *manner*;" whether in the present, or in any different one.

16. Section 5. So, whether "constantly or usually" some shall sit in the *Outer House* or *Bill Chamber*; others in the *Inner House*.

17. Section 5. So, in what "*rotation*;" for example, "of *years, sessions, months or weeks*;" regard being had to "*dispatch of business and avoiding of expense.*"

18. Section 4. So, to regulate the *days* of sitting in the two *Divisions during the time of session*: (in which phrase seems to be implied, that in *vacation* times, being four months and two months, total six months, in the year, neither of the divisions are to sit; viz. in the Inner House: with the exception, probably of Ordinaries, in the Outer House and Bill Chamber, as at present.)

19. Section 9. So, to regulate concerning the *remittal* of

(a) Since the text was written (indeed since it was printed) came into my hands another Bill that has issued from the same high source. Of the several alterations contained in it, there is not, I believe, one, of any importance, the demand for which had not presented itself to my observation, and been made the subject of remark, either in print or manuscript. So far as this coincidence has taken place, what was matter of censure when applied to the first Bill, will operate, of course, as matter of justification, when applied to the second.

The regulations which, by the powers given, as above, would, under the first Bill, have been made *definitive*, are, under the amended Bill, declared to be but *provisional*, subject to alteration by Parliament, either of its own motion, or at the suggestion of the Commissioners hereinabove and hereinafter mentioned. In point of effect, the difference will be found to be prodigious and proportionably beneficial; but the original design ought not to be forgotten.



of causes from Division to Division, in consideration of a "*connection*" between cause and cause.

20. Section 11. So, to regulate concerning the "*forms of proceeding and process*" in each Division: "and particularly concerning the mode of conducting the *pleadings* by writing or *viva voce*," and that as well in the "Inner House, as before the Ordinaries.

§ 4. Contents of Part III. *Authority, inquisitorial and initiative.*

1. Section 18. Power to the King, either by *letters patent*, or by instrument under his *sign manual*, to appoint Commissioners (*number* not limited) to sit at such times and places as they think fit, for the exercise of the functions hereinafter mentioned; with power to choose a *Præses* (i. e. one of their number (it is supposed) for *Præses*) as also "a clerk" (*one clerk*).

2. Section 18. Authority, (without any coercive power) to these Commissioners, "to make *full inquiries*" (without power for compelling *answers* to any such inquiries) "into "the present forms of the Court in conducting *process, extracting decrees, registration* of the same, and *execution thereon, or upon letters of diligence*" (*Anglicé process*) "passing the signet, or any other matters touching the "*process or proceeding* of the said Court." (*Process Scoticé* is synonymous to *proceeding Anglicé*.)

3. Section 18. Authority "to set down in writing,— "*amendments*," such as "shall appear to them—most "reasonable and best calculated for the *due administration of justice* in that Court."

N.B. So far as concerns the Court of Session, every point in which the *personal* interest of the Judges is more particularly concerned, and in particular that "*repose*" to which their determination to sacrifice the interests of justice has been solemnly declared, (Memorial, Art. 50) seems left to the uncontrouled operation of that *sinister* interest:—the Commissioners not authorized so much as to *propose* anything in relation to it.

*Forms of Pleading*—(a subject sufficient of itself to absorb the whole of a man's time for months or years)—another point which the Commissioners are not to meddle with: reserved for the Judges, whose determination not to give up a particle of their time has been declared as above. (b)

4. Section 18. Authority "to inquire into the fees, perquisites,

(b) See note (a) to p. 107.



“quisites, and emoluments, claimed by or belonging to  
 “the clerks and officers of the Court, and other members  
 “of the *College of Justice*,” (including those called in  
 England, *Attorneys* and *Solicitors*?) “or” (and) “persons  
 “connected with the said Court, the Faculty of *Advocates*  
 “excepted.”

5. Section 11. Authority to report “how far the same,”  
 (viz. the fees, &c.) “are now reasonable or” (and) “ought to  
 “be *allowed* or *increased*.” (Under the words “*how far*,”  
 “would *diminution* be understood to be comprised, as  
 “well as *increase* and total *disallowance*?”)

6. Section 18. In case of the abolition of any “*emolu-  
 ments*” by “regulations *introduced* by this Act,” or “by  
 the adoption of any regulations” *proposed* as above, (nothing  
 said of abolition by regulation, if any, made by the *Court  
 of Session*) authority to report what *satisfaction* it may be  
 reasonable to make to the persons deprived of such emolu-  
 ments. (Of satisfaction for loss accruing to persons enti-  
 tled to *nominate* to the offices, the emoluments of which  
 may then come to be abolished, nothing is said.)

7. Section 18. Authority to propose regulations “rela-  
 “tive to processes, or causes to be brought into the Court  
 “of Session by *advocation*” (*Anglicé* by *certiorari*) “or sus-  
 “pension” (*Anglicé* by *writ of error or appeal*) “or in the first  
 “instance, or before the Circuit Court;” i. e. (as explained  
 in the preambulatory part of this section) “the Circuit  
 Court of *Justiciary* by appeal.” (Procedure in causes  
 brought into the Court of Session *in the first instance*,  
 having (as per No. 3.) been already included in the au-  
 thority given to these Commissioners, what is it that can  
 have been intended by the words, *first instance*, in this  
 clause, which appears not to have any other object than  
 the option to be made as between one mode of appeal  
 and another?)

8. Section 18. Authority “to inquire into the *fees, per-  
 quisites*, or *emoluments*, claimed by the clerks and other  
 officers,” (Judges, it seems, excepted) in the *Sheriff’s Courts*  
 in Scotland; (c) “and to take and set down in writing what  
 occurs to them relative thereto.”

[1. Of the great variety of inferior Judicatories or *She-  
 riff Depute’s Courts*, (not to mention their *Substitute’s*  
*Courts*, which in fact are distinct Judicatories with ap-  
 peal to the respective principals) *Justice of Peace Courts*,  
*Borough*

(c) In the amended Bill are added, “*Admiralty, Commissary, and other  
 Courts.*”



*Borough Bailie's Courts, Dean of Guild's Courts, Barons Courts, Commissaries' Courts*, of different ranks one above another, *Admiralty Courts*, ditto, all liable to have their proceedings reviewed by the Court of Session, how happens it that the inquiry is confined to the "*Sheriff Courts*," meaning the Sheriff Depute's Court?)

2. Under this term, "*Sheriff Courts*," not very usual in Scotch law) would the Judicatories filled by the *Substitutes* be understood to be included, as well as those filled by the principals?

3. In the instance of the Judicatories, included, as above, in the authority for making inquiry, why confine the inquiry to the subject of the "*emoluments*," excluding the *system of procedure*, between which and the system of procedure pursued in the *Court of Session*, (the Judiciary by which the proceedings in those subordinate Courts are reviewed) the connection is necessarily so intimate?

4. "*Taking and setting down in writing what occurs—relating thereto*"—By this expression was it meant to *denote*, or to *include*, authority for proposing "alterations or amendments," as in the case of the Court of Session? If so, what can have been the reason for thus varying the phrase? (*d*)

9. Section 18. Like authority respecting "the state of the

(*d*) In the amended Bill is included in the authorities that of "making inquiry into the proceedings in the Admiralty and Commissary Courts, "and in the inferior Courts in Scotland, relative to matters of a civil nature, and to report in what manner *these* may be improved." (*These* indicates a Scotch hand.) The Sheriff Courts—how came they on this occasion to be omitted? On the occasion of *fees*, &c. they were specified, as per note (*c*). Are Sheriff Courts understood to be included under the denomination of "*inferior*" Courts?

In the amended Bill, in the enacting part relative to the fees, &c. between the word "*Sheriff*" and the word "*Courts*," is inserted the word "*other*," which of course takes in all Courts, the *Small Debt Courts* not excepted. To clear away these uncertainties, would not a schedule of the Courts be of use?

Other authorities added in the amended Bill are—

1. (To these sign manual Commissioners,) to report in what manner and form—Jury trial could be most usefully established "*in that Court*," (nor in any other.)

2. In what manner the present form of process in *that* "Court," (the Court of Session, as above) "might be improved by conducting more of the "*pleadings viva voce*."

3. "By limiting the power vested in single Judges of frequently reviewing their own interlocutory judgments:"—(This for extirpating the abomination of *representations*.)

4. "By obviating inconveniences arising from the mode now practised "in taking proofs by *Commission*."

5. "By regulations relative to proceedings in the Bill Chamber."



the *records* in these Courts:" viz. the "Sheriff Courts," and those only, as aforesaid. (Like queries to this clause, as to the one last mentioned.)

10. Section 18. Injunction to these Commissioners, to report "the whole of their proceedings to his Majesty, with all convenient speed:" the Report "to be laid before *both Houses* of Parliament, by *one* of his Majesty's Principal Secretaries of State."

11. Section 19. Power to "his Majesty, in and by Letters Patent under the *Great Seal* of the United Kingdom," (i.e. to the noble and learned Mover of the Bill) "to nominate any number of persons not exceeding" (with a blank for the *number*) and such persons being either" (with another blank for the *qualifications*). (e)

2. Section 19. Authority "to make inquiry *by all such lawful ways and means as shall seem to them expedient* "in that behalf, *how far* it might be of *evident* utility to "introduce into the Proceedings of the Court of Session, "or any other Court in Scotland, *Trial by Jury*" (no authority having been given, either to *this* or the *other* set of Commissioners, for making any inquiry into the system of procedure pursued in any such other Court) "in "any and what cases, in matters of a civil nature, and in "what manner and form the same could be most usefully "established."

13. Section 19. Injunction to *report*, as in the case of the *Sign manual* Commissioners.

[On the occasion of the *shadow of power*, given, as above, to the two sets of Commissioners, for the collection of the requisite stock of information, quære, what can have been the reason of the extraordinary difference observable in the delineation of the shadow, in the two cases? And quære, what could have been intended, or supposed to have been done by the line of words here printed in italics?]

#### § 5. Part IV. *Regulations touching APPEALS; viz. from Session to Lords.*

1. Section 16. Power to the House of Lords "in its *sound* discretion."—to decree payment of interest, simple or compound, by any of the parties appellant. (The House, has it then *two* sorts of *discretion*, a *sound* and an *unsound* sort; the sound not to be brought into action but on great occasions? Or is it that, there being but *one*

(e) These Great Seal Commissioners are removed out of the amended Bill. They were knocked on the head by the Resolutions voted by the whole Faculty of Advocates.



one sort, the soundness of it is intended to be secured by its being thus *enacted* to be *sound*!)

2. Section 14. "When any appeal is lodged in the House of Lords" . . . power to "the presiding Judge, with the Judges of the Division to which the cause belongs," or any three of them, to regulate all matters relative to *interim possession*, or execution, and payment of "costs and expences already incurred, according to their *sound* discretion, having a just regard to the interests of the parties, as they may be affected by the affirmance or reversal of the decree appealed from."

3. Section 14. "When any appeal is lodged in the House of Lords, a copy of the petition of appeal *shall* be laid by the appellant or appellants, or by the respondent or respondents, before the presiding Judge," &c. as above. (The word *shall*, is to be considered, as *imperative*, or as *simply permissive*? If *imperative*, on whom? Or was it not meant that it should be, in the first instance, *imperative* upon *somebody*, and then eventually *permissive* to *somebody else*. And if so, at what *time* was it understood that the permission should commence?) &c. &c. &c.

2. Section 15. Of *interim* regulations, so made as above, the *execution* is not to be *stopped* by *appeal*.

2. Section 15. "Respecting all matters . . . done," or "having taken place . . . in consequence of such regulations so made as to interim possession, execution and payment of expences or *costs*," power to the House of Lords, on the appeal from the decree "to make such order . . . as the justice of the case shall appear to the said House of Lords to require."

6. Section 13. "From *interlocutory* judgments" . . . "no appeal," . . . "except with the leave of the Division of the Judges pronouncing such interlocutory judgments."

7. Section 13. "When a final judgment or decree is "appealed from," power "to either party to appeal . . . from "all or any of the Interlocutors . . . pronounced in the cause, "so that the whole, as far as necessary, may be brought "under the review of the House of Lords."

8. Section 13. No appeal to "be allowed from interlocutors or decrees of Lords Ordinary, which have not "been reviewed by the Judges sitting in the Division to "which such Lords Ordinary belong."

§ 6. PHRASEOLOGY, a Topic dismissed.

On the subject of *Part the first*, as above marked out, I shall not, on the present occasion at least, attempt giving your Lordship any further trouble.

So



So far as concerns this *first* part of the Bill, such remarks as I should have to submit, would turn chiefly upon the *penmanship*. Doubts, for example, concerning the meaning of the learned scribe; and, supposing the meaning rightly guessed at, doubts whether the words would answer the purpose of giving effect to it.

In legislation, though there cannot be anything but what has its importance, yet as between *style* and *matter*, so far as they are capable of being separated, *matter* will, in the order of importance, claim an undisputed preference. Thence it is that, for the present at least, *Part the first* is put aside.

The apprehension I have been all along under of falling into the sin of *misrepresentation*, and my anxiety under that apprehension, must already have betrayed itself. Of misrepresentation, there are two modes: one is, when, the language of the *original* being *clear*, the *representation* given of it is *unfaithful*, *ambiguous*, or *obscure*: the other is, when, the language of the *original* being *obscure* or *ambiguous*, the *representation* given of it is *clear* and *decisive*.

In *practice*, this *last* mode of misrepresentation is the most *mischievous*. Be the *original* what it may, if the *abridgment* appear unintelligible or doubtful, a man betakes himself to the original, of course: but if, the *original* being *ambiguous*, the *abridgment* be *clear*, the clearer it is, the more perfectly he is satisfied with it, and the less he suspects the danger he is exposing himself to, by trusting to the abridgment, and upon the faith of it, ascribing to the original a sense, which, when the time comes, may prove, to his dismay, to be different from the sense put upon it by the Judge.

How happens it?—(over and over again have I asked myself this question, without ever having been able to find an answer)—how happens it, that throughout the texture of this Bill, the language is continually varying—varying, as between clause and clause—between clauses, in which, so far as can be concluded against the presumption afforded by the variation in the language, the import meant to be conveyed was exactly the same?—To what cause shall this perpetual departure, departure of a man from himself, be ascribed?—to *thought*, or to *want of thought*? Is it that *certainty* was sacrificed, perpetually and deliberately sacrificed, to an imagined *beauty*—beauty supposed to be produced in an Act of Parliament by variety of style? Or is it that this Bill, a Bill on which the state and fate of justice in one of the three Kingdoms depends—this truly momentous Bill, having, in the manner of a *speech spoken*, been dictated to an *amanuensis*, was never looked at afterwards?



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ence. Hence it is that, for the present at least, I put the  
first in the second place.  
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given of it is untrue; and the other, the other  
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Bentham, Jeremy,

Scotch reform considered with reference to the plan proposed in the late  
parliament

London 1808

Brit. 53 mk

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